IN THE

Supreme Court Of The United States

OCTOBER TERM, 1978

NO. 78-328

Joe Henry Chambers ..... *Petitioner*

V.

United States of America ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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Petitioner, Joe Henry Chambers, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on June 29, 1978, and the Order of the United States Court of Appeals for the Eighth Circuit denying Petition for rehearing and Petition for Rehearing En Banc entered on July 28, 1978.

OPINION BELOW

The opinion of the Court of Appeals in this cause has not yet appeared in the official Federal Reports, but a copy thereof is appended hereto as Appendix B. The Order entered denying Petition for Rehearing and Rehearing En Banc has not appeared in the official reports but a copy is Appended hereto as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked because of various prejudicial errors in denying requests of the Petitioner and admitting prejudicial evidence over his objections. The judgment sought to be reviewed was entered on June 29, 1978. The Petition for Rehearing was denied on July 28, 1978, a copy of the order denying same being appended hereto as Appendix C. Title 28 USCA 1254(1) confers upon this Court the jurisdiction to review the judgment in question by Writ of Certiorari.

QUESTIONS PRESENTED

I. The admission of the written statement of codefendant Griffin, with primarily name references to the other defendants excised only, violated petitioner's right to cross-examination secured him by the confrontation clause of the Sixth Amendment.

II. The written statements (excised as to primarily name only) of all three of the defendants, were

acts of concealment of the conspiracy alleged in Count I and as such should not have been introduced on Count I of the indictment.

III. The written statements of Griffin and Hansel were inadmissible hearsay as to the conspiracy count under the law of conspiracy of this court and the "in furtherance of" requirement of Rule 801 (d) (2) (e) of the Federal Rules of Evidence.

IV. The failure of the trial court upon timely request to give a cautionary instruction at the time of introduction of the written statements of petitioner and codefendants Griffin and Hansel. As to the limited effect of statements of co-conspirators.

V. The introduction of the written statement of informant Boggess and his testimony thereon was irrelevant and prejudicial.

VI. Count III of the indictment neither alleges an essential element of a charge of a violation of §1006, nor the manner or means by which the criminal offense was to have been committed and is constitutionally defective.

VII. Admission of proof of four alleged same or similar transactions was in error and in violation of Federal Rules of Evidence 403 and 404 (b) as properly applied.

VIII. A directed verdict of acquittal should have been directed for petitioner Chambers on Count V — the §1014 violation, since the Government's proof lacked the essential element of scienter and the evidence was insufficient to show any connection of petitioner with the act alleged in Count V.

IX. "Intent to defraud" as defined by the District Court in its closing instructions to the jury improperly defined the "intent" element of the offense a §1006 violation.

X. The proffered minutes of the Lonoke Production Credit Association were admissible and the trial court should have granted a continuance to Chambers to investigate the circumstances surrounding the minutes.

STATEMENT OF THE CASE

Petitioner Joe Henry Chambers was jointly indicted and tried with co-defendants Griffin and Hansel on a five count indictment which alleged substantive violations of §1006 for each defendant, substantive violations of §1014 and 2 for each defendant and a conspiracy violation 371. Appendix A. Chambers was found guilty on Count I, the conspiracy count, and Count III, the substantive charge against Chambers only of §1006; but not guilty of Count V, the substantive charge of 2 and §1014. Griffin and Hansel were found guilty on Count I, Count II the substantive charge of §1006 against Griffin only, Count IV the substantive charge of §1006 against Hansel only, and Count V the §1014 substantive charge.

Petitioner Chambers was sentenced to serve a concurrent jail sentence of 15 months on each of Count I and Count III and to pay a fine of $5,000.00 on Count I and a fine of $2,500.00 on Count III. Petitioner Appealed to the Eighth Circuit Court of Appeals; his conviction was affirmed on June 29, 1978, (Appendix B). His petition for rehearing was denied on July 28, 1978, (Appendix C). Months before and again during the trial, petitioner Chambers moved dismiss Count III of his indictment; for evidence favorable to the defense, and for a bill of particulars and Petitioner Chambers also requested a severance; all of which were denied by the Court.

During opening statements the government attorney referred to of the defendants written statements (opening statements T. 23-30).

The defense of petitioner Chambers is that he was a licensed realtor at the time of the indictment transaction and was not prohibited from buying and selling property, thus no criminal intent was presented to support his conviction on any count.

During the trial, over petitioners objection, pursuant to Rules 403 and 404 of the Federal Rules of Evidence, the government introduced evidence of two two-part transactions all four parts of which were supposed to be separate violations.

The proof of these two two-part transactions as developed, disclosed that all of the essential physical characteristics of the indictment transaction were not present in the extraneous offense transactions, that one part of each of the two two-part transactions occurred several years prior to the indictment transaction and at a time when the regulations governing the actions of the three co-defendants were different than those at the time of the indictment transaction. More importantly to the extreme prejudice of petitioner the demonstrative nature of this proof was overwhelming.

The essential physical characteristics in the indictment case are the forced purchase of a particular farm after an advancement of P.C.A. loan proceeds after approval of the loan application containing a false

statement reference purpose (Govt. Exh. 7, 8, & 9, T. 113) from a trustee-attorney (Vii, T. 25, 120) (Viii, T.40, 48, 80) (Viv, T. 69) by the defendants (Viii, T. 80) (Viv, T. 69) and the receipt of monies by the defendants for same. (Viv, T. 189).

Four same or similar transactions, proof consisting of the two-part transaction of Weber-Bearden and Boothe of 28 exhibits with large demonstrative charts accompanied by handouts and six witnesses and of the Max Lasley transaction consisting of 22 exhibits with two demonstrative charts, accompanying handouts and four witnesses, were introduced. 50 exhibits with accompanying witnesses and charts, out of a total number of Government exhibits of 115, were used by the Government, as was the final two days of their case, to prove these acts that were limited to Counts I and V of the indictment. In addition, different regulations of the P.C.A. were in effect for part of the Max Lasley transaction, which occurred in 1972, and for the initial part of the Weber-Bearden transaction, which occurred in 1972. The regulations in effect at the time of the indictment were not promulgated until the latter part of 1973. (Vii, T. 13, 17). No bad intent can be inferred from a transaction which was not against the regulations at the time it occurred—not outside the bounds of defendant's profession.

During the governments case the written statements Appendix D of the three defendants, Joe Henry Chambers (Vv, T. 170, Gov. Ex. 66) dated July

23, 1976, Charles Griffin (Vv, T. 181, Gov. Ex. 68) dated July 22, 1976, Bill Hansel (Vv, T. 159, Gov. Ex. 64) dated July 22, 1976, and informant Jimmy Boggess (Vvi, T. 58, Gov. Ex. 69) Appendix E were introduced by the Government into evidence for the truth of the matter asserted. Primarily the names of each of the co-defendants had been excised from each of the other defendant's statements at the time introduced, but all of the statements were similar in substance and language and were incriminatory of all defendants, for informant Boggess, after being granted immunity, later testified for the Government that his statement was false in its particulars and that the defendants had told him what to say; and co-defendant, Bill Hansel testified that his statement was also false. Moreover, prior to testimony in the case the U.S. Attorney had read in opening statements, without objection of counsel, each defendant's statement including the name references to all four persons each defendant's statement (opening statement, T. 23, T. 25-27, T. 27-30). Chambers' attorney had not read or referred to any of the defendant's statements in opening statement. Neither Chambers nor Griffin took the witness stand.

No limiting instruction of any kind was given by the Court at the time of the introduction of either petitioner Chambers or co-defendant Griffin's written statement, even though the Court recognized that at the least the statements should be limited to the defendant whose statement it was. Neither was there a limiting instruction given to the effect of the written statement of defendant Hansel as to upon which count the evidence

was admissible: the conspiracy count (Count I) or the substantive Counts, II, III, IV, V, even though such instruction was specifically requested by Chambers.

After discovery by the petitioner of relevant minutes of the Lonoke Production Credit Association, Appendix F, on the sixth day of trial the District Court refused to grant a continuance so that the defendants could investigate the circumstances surrounding the minutes. The court also refused to introduce the minutes or to allow cross-examination with reference to the minutes.

Petitioner Chambers was not granted a verdict of acquittal by the court on Count V—the §1014 charge. The proof was that the meaning of the term allegedly false "crop loan" was ambiguous and by the defendants' usage of the term there could be no false statement violation since the important element of scienter was not present. The defendants' usage of the term is supported in the record by the testimony of several farmers in that area who testified when they say "crop loan" in their application, they can use the money for anything they wish, but that their crop is pledged as security for the loan. Odus Chapman (Vix, T. 132); Walter Tinkle (Vix, T. 134); Donald Chapman (Vix, T. 137); Jim Malone (Vix, T. 140); Darrell Saul (Vix, T. 154) L.W. Morris (Vix, T. 157); A. S. Kelley (Vix, T. 165); and Leroy Isbell (Vix, T. 173) Thus the term was accurately used in the loan application in question.

Chambers asserted also that he was neither an aider and abettor nor a principal to the act alleged in Count V. The record supports his assertion.

Finally over the objection of Petitioner Chambers the District Court submitted its own definition of the term "intent to defraud" to the jury in closing instruction. By doing so, the court intended to define the term in light of §1006; but we submit in doing so the Court impermissibly broadened the scope of §1006 and permitted a conviction thereunder for an act not intended to be criminal by the legislature of the United States.

REASONS FOR GRANTING THE WRIT

I.

The admission of the written statement of co-defendant Griffin, with primarily name references to the other defendants excised only, violated petitioner's right to cross-examination secured him by the confrontation clause of the Sixth Amendment.

1. A substantial question of the continued viability of this Court's decision in *Bruton v. United States*, 391 U.S. 123 (1968) is raised by this decision of the Eighth Circuit Court of Appeals.

In *Bruton, supra*, this Court, relying upon the confrontation clause of the Sixth Amendment, held that a conviction of a defendant in a joint trial should be set aside although the jury was instructed that a codefendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence.

Bruton, as its predecessor *Delli Paoli v. United States*, 389 U.S. 818 (1957) later overruled by *Bruton*, presupposed that at the very least a limiting instruction of the effect of the statement of the codefendant should be given by the court to limit the effect of the statement. See *Clune v. United States*, 159 U.S. 590, 593 (1895); *Fiswick v. United States*, 329 U.S. 211 (1946); *Krulewitch v. United States*, 336 U.S. 440 (1949). In this case *no* instruction was given at the time codefendant Griffin's written statement was introduced.

A fortiori petitioner's constitutional rights were violated.

Respectfully, the written statement of Griffin unexplained was incriminating to defendant Chambers even though references to the other defendants by name were excised at the time the statements were introduced. The written statements of all three defendants and informant Boggess were similar in language and import. Boggess testified that his statement was false and that the defendants told him what to say. Hansel testified also that his (Hansel's) statement was false. We note both Hansel and Boggess had been represented by the same attorney until one week before. (Vv, T. 200, 201) The clear implication is that unless Griffin explains the true circumstances concerning his statement, the jury will believe that his statement is also false, and that if Griffin's statement is false, then so is Chambers'. Yet codefendant Griffin is not available to testify for Chambers and to be cross-examined by Chambers.

Furthermore, the Government has read to the jury each one of the three written statements (with name references not excised) of the defendants, including *in each* statement the many references to the other two codefendants and the informant Boggess Appendix F.

Moreover the District Court instructed the jury in closing instructions on exculpatory statements proved false. Clearly the instruction increased the effect of

Griffin's incriminatory statement on Chambers. The jury recalls and an unwarranted conviction results, based upon unconstitutional hearsay—the statement of Griffin.

The principles of *Bruton* apply to this case (presupposed by the opinion of the Eight Circuit Court of Appeals), not that of *Dutton v. Evans*, 400 U.S. 74 (1970). If the statement complained about is hearsay, then *Bruton* applies; if not, then *Dutton* applies. Here the Government introduced the statements for all purposes (Vv, T. 152) (Vv, T. 133). The Government never disclosed to the court that the statements were introduced for a limited purpose, and the statements were *never* limited as to purpose.

Even were the *Dutton* rule to apply, there is still reversible error for the statement of Griffin was crucial and devastating to Chambers. *Anderson v. United States*, 417 U.S. 211 (1974) authored by Mr. Justice Marshall; *United States v. Kelley*, 551 F.2d 760 (8th Cir. 1977).

Only that the Assistant U. S. Attorney read the statements into evidence in the opening statement was discussed by the Court of Appeals. That error was *not* the primary thrust of Chambers' appeal, and for that reason alone this court should grant this petition.

2. The Eight Circuit Court of Appeals in the case at bar is in direct conflict with regard to this issue of the continued validity of *Bruton, supra.*

In *United States v. DiRodio*, 565 F.2d 573 (9th Cir. 1977) the court held in a similar case that the introduction of such a statement in a joint trial is a violation of a defendant's constitutional right of cross-examination.

II.

The written statements (excised as to primarily name only) of all three of the defendants, (Appendix D, and the unexcised statement of informant Boggess, Appendix E,) were acts of concealment of the conspiracy alleged in Count I and as such should not have been introduced on Count I of the indictment.

An extremely important question of the continued validity of this Court's decision in *Grunewald v. United States*, 353 U.S. 391 (1957) is raised by this decision of the Court of Appeals.

The written statements of all three codefendants and the informant Jimmy Boggess were exculpatory on their face. They became incriminatory only after the informant Boggess and codefendant Hansel testified that the statements were false. See Point I, *supra*. These exculpatory statements were at the worst an attempt to conceal the conspiracy count of the indictment transaction at a time when the conspiracy had ended. Upon timely objection they should not have been admissible on the conspiracy count or, at the very least, the effect of the statements should have been

limited to the substantive violations of §1006. *Grunewald, supra* which was not done.

Grunewald held that acts of cover-up of a conspiracy are inadmissible to prove the conspiracy violation. The acts of cover-up in *Grunewald* included statements of the defendant and his codefendant. Respectfully, the continued validity of *Grunewald* has been questioned in the Eight Circuit; that question should be answered.

III.

The written statements of Griffin and Hansel were inadmissible hearsay as to the conspiracy count under the law of conspiracy of this court and the "in furtherance of" requirement of Rule 801 (d) (2) (e) of the Federal Rules of Evidence.

1. A substantial issue is raised as to the continued validity of this court's decisions in *Krulewitch v. United States*, 336 U.S. 440 (1949) and *Lutwak v. United States*, 344 U.S. 604 (1953).

The statement of Griffin is inadmissible hearsay insofar as petitioner Chambers is concerned, since the statements were made after the alleged conspiracy had ended. Though the trial court recognized that the statement of a defendant was inadmissible against other defendants, he *did not* so instruct the jury as to Griffin's statement; even though the error was brought to the court's attention and an instruction was requested. The

only instruction given with reference to the statement of the alleged conspirators, Griffin and Hansel, was that at the close of the Government's case which made no reference to any defendant by name and was given some twelve days later on July 5, 1977 (Vxi, T. 20).

Krulewitch, supra, and *Lutwak, supra,* held that statements made by coconspirators after the alleged conspiracy has ended are inadmissible hearsay against any one other than the individual defendant who made the statement.

2. The continued viability of the requirement of such statements being "in furtherance of" the conspiracy before admissibility arising from Rule 801 (d) (2) (e) is raised in the case at bar.

Prior to this decision the Eighth Circuit had consistently held that the "in furtherance of" requirement arises from Rule 801 (d) (2) (e) and is to be applied in the proper case. *United States v. Harris,* 546 F.2d 234, (8th Cir. 1977); *United States v. Jackson,* 549 F.2d 517, 534 (8th Cir. 1977).

In the case at bar the District Court stated that the statements were made long after the conspiracy had ended. Clearly they were not "in furtherance of" the conspiracy.

3. The decision in the case at bar is in direct conflict with the Ninth Circuit Court of Appeals.

In *Di Rodio, supra,* the error of the introduction of testimony about the out-of-court statements of a codefendant coconspirator not made in furtherance of a conspiracy or during the pendency of the conspiracy could not be cured by a limiting instruction. Again, at the least, a limiting instruction is pre-supposed. In the case at bar there was not even a limiting instruction from the court at the time the statements were introduced. This court should reconcile the decisions of these two circuits.

IV.

The failure of the trial court upon timely request to give a cautionary instruction at the time of introduction of the written statements of petitioner and codefendants Griffin and Hansel as to the limited effect of the statements of co-conspirators.

This court should resolve this important question so that the conflicts between the circuits with reference to this issue can be resolved.

The Fifth Circuit has held that the introduction of such a statement without limitation results in reversible error under certain circumstances. *United States v. Apollo,* 476 F.2d 156 (5th Cir. 1973). The First Circuit did so hold at one time, *U.S. v. Honneus,* 508 F.2d 566 (1st Cir. 1974), though at the present time it does not. *United States v. Petrozzrillo,* 548 F.2d 20 (1st Cir. 1977). Even the Eighth Circuit has in other cases specifically reserved for the appropriate time this important

question of limiting instructions. See Note 4, *United States v.Kelley*, 526 F.2d 615 (8th Cir. 1975). See Judge Gibson, Note 4, *United States v. Graham*, 548 F.2d 1302 (8th Cir. 1977). See Circuit Judge Henley, Note 8, *United States v. Smith*, 564 F.2d 244 (8th Cir. 1977). However, on April 19, 1978, in *United States v. Bell*, No. 77-1894 (April 19, 1978), Appendix G, the Eighth Circuit held that from henceforth the question of the existence of a conspiracy is for the court alone, unless the existence is not later supported by the evidence, in which event the court should declare a mistrial unless a cautionary instruction would cure the prejudice. *Bell* apparently is in direct conflict with *Apollo, supra*, and *Honneus, supra*, as is the case at bar.

In the case at bar the District Court had determined the conspiracy was *not* in existence at the time the statements were made; yet the court still introduced the statements (contrary to *Bell, supra*). At that time the petitioner requested a timely limiting instruction to which he would have been entitled at the time under *Apollo, supra*, or a mistrial in any event under *Bell* if *Bell* were retroactively applied. The court made a mistake, in any event, and reversible error was the result. The only instruction given with reference to the statement of the alleged conspirator Griffin was that at the close of the case which made no reference to any defendant by name and was given some twelve days later on July 6, 1977.

V.

The introduction of the written statement of informant Boggess and his testimony thereon was irrelevant and prejudicial.

This court should review this error of law in conjunction with Question I, supra, petitioner's constitutional right of cross-examination. Jimmy Boggess was not a defendant in the case. He was not indicted as a coconspirator in the case. He was not even an unindicted coconspirator in the case, as the proof discloses; and his statement was given years after any alleged conspiracy had ended.

The written statement of Boggess Appendix E and his testimony in reference of same is inadmissible on Count III as being impeachment on a collateral issue.

That Boggess has lied to the Government investigators is not relevant to Count III. The only purpose possible for this testimony of Boggess was to demonstrate: (1) Boggess' statement is similar to the defendant's statements; (2) Boggess is a liar; (3) the defendants told Boggess to lie; (4) that the defendants are liars. Clearly this is not a proper purpose, Rule 404 (a) Federal Rules of Evidence.

VI.

Count III of the indictment neither alleges an essential element of a charge of a violation of §1006, nor

the manner or means by which the criminal offense was to have been committed and is constitutionally defective.

1. A substantial question of law is raised by the direct conflict between the decision in this case and this court's previous decisions, culminating in *Hamling v. United States*, 418 U.S. 87 (1974). Mr. Justice Rehnquist stated the law succinctly in *Hamling:*

> "Our prior cases indicate that an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Hagner v. U.S.*, 285 U.S. 427, 52 S.Ct. 417, 76 L.Ed. 861 (1932); *U.S. v. Debrow*, 346 U.S. 374, 74 S.Ct. 113, 98 L.Ed. 92 (1953). It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.' *U.S. v. Carll*, 105 U.S. 611, 612, 26 L.Ed. 1135 (1881). Undoubtedly the language of the statute may be used in the general description of the offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged. *U.S. v. Hess*, 124 U.S. 483, 487, 88 S.Ct. 571, 573, 31 L.Ed. 516 (1888)."

Prior to this time even the Eighth Circuit Court of Appeals had applied the first requirement of *Hamling, supra. U.S. v. Brown*, 540 F.2d 364 (8th Cir. 1976),

authored by Circuit Judge Webster. *Brown, surpa*, held that all essential elements of the offense must be alleged, and the indictment there also established a time frame, identified the victims, the property extorted, the *methods of extortion*, and the nature of the commerce affected.

Count III of Petitioners indictment reads as follows:

> "Count III: I. The grand Jury realleges the allegations contained in Paragraph I of Count I.
>
> II. That on or about the 26th day of July, 1974, in the Eastern District of Arkansas, JOE HENRY CHAMBERS, being Vice President of the Lonoke Production Credit Asso. a federally chartered body corporate and instrumentality of the U.S. of America under the supervision of the Federal Intermediate Credit Bank (FICB) of St. Louis, MO, and the Farm Credit Adm. with intent to defraud said association did participate, share in and directly and indirectly receive monies, profits and benefits, that is the sum of $20,000.00 by means of and through the disbursement by the said Ass. of its Check NO. 60491, and Maudie Huntsman, dated the 24th of July, 1974, and purportedly representing proceeds of crop loan to Harold V. Huntsman and Maudie Huntsman, thereby violating the provisions of Title 18, U.S. Code, Section 1006."

Appendix A

An essential element of a §1006 Violation is not alleged: "(2) That the defendant participated, shared in or received either directly or indirectly, money, profit or benefit *by and through any transaction of such institution.*" *United States v. Hykel*, 461 F.2d 721 (3rd Cir. 1972) emphasis added.

Most certainly, the manner or means by which the offense is alleged to have been committed is not alleged; rather the indictment only tracks the language of the statute. That the indictment mentions what Chambers was to have received and the transaction involved without more does not cure these constitutional defects, as the Court of Appeals states.

Both manner and means and the essential element "by and through any transaction" are also important from the standpoint of double jeopardy and notice. A §1006 violation is an offense against an association with which a defendant is supposed to have a fiduciary relationship, which offense occurred in this "fiduciary" capacity. A manner, means or method was not detailed by which the crime was committed. The "conflict of interest" for which Chambers is being punished is not specified. Without alleging facts supporting a conflict of interest, and all essential elements of the offense no criminal act is alleged. Only by detailing the manner and means and alleging the essential elements can a defendant establish and protect his double jeopardy rights.

After reading Count III it is apparent that an act of violation of 18 USC §657 is alleged; not one in violation of 18 USC §1014. Without manner or means and without the above essential element of a charge of §1014, petitioner was charged as an agent or employee of a lending institution who embezzled, abstracted, perceived or willfully misapplied something of value belonging to such institution. A decision in the Seventh Circuit has specifically held that such an indictment should be reversed. *United States v. Quinn*, 365 F.2d 256 (7th Cir. 1966).

The earliest Supreme Court decision on this subject is *United States v. Mills*, 7 Pet. 138, 8 L.Ed. 636 (1833 U.S.), where without explicit reference to the Sixth Amendment, the court held:

> "The offense must be set forth with clearness, and all necessary certainty, to apprise the accused of the crime with which he stands charged."

The first constitutionally-oriented decision was *United States v. Cruikshank*, 92 U.S. (1875).

We respectfully submit that the Fifth Amendment to the United States Constitution as construed by the court demands that the defendant in the case at bar be tried *only* on the indictment of the Grand Jury. *Ex Parte Bain*, 121 U.S. 1; *Stirone v. United States*, 361 U.S. 212 (1960); *United States v. Camp*, 541 F.2d 737 (8th Cir. 1971).

2. The decision of the Eighth Circuit Court of Appeals is inconsistent with the position of the Seventh Circuit involving indictments for violations of §1006.

Two §1006 Counts of a four count indictment were held to be defective in *U.S. v. Quinn*, 365 F.2d 256 (7th Cir. 1966). There the defendant was convicted of two §657 and two §1006 violations. Held "through a transaction of such an institution" is an essential allegation of a §1006 violation. In another §1006 count the manner or means of committing the offense was not alleged. Result: Two counts reversed.

The decision of the 8th Circuit in the case at bar should be reviewed by this Court to resolve the conflict between the circuits and to protect the petitioners rights.

VII.

Admission of proof of four alleged, same or similar transactions was in error and in violation of Federal Rules of Evidence 403 and 404(b) as properly applied.

1. The various circuit courts of appeal apply varying standards in their individual application of the Federal Rules of Evidence 403 and 404(b). Some circuits have held the adoption of the Federal Rules of Evidence did not represent a new rule of decision. Other circuits have recognized that the new Federal Rules of Evidence 403 and 404(b) did not change the pre-existing case law.

The Eighth Circuit Court of Appeals has held the Federal Rules of Evidence 403 and 404(b) have substantially changed the pre-existing law and; this holding was applied in the case at bar. This court should resolve this issue so that the rule of law applied in all circuits is uniform.

The fifth Circuit Court of Appeals in *United States v. Beechum*, 555 F.2d 487 (5th Cir. 1977) specifically held that the rule of law, that the essential physical elements of the indictment case must be present in the "other act" evidence before admissibility, established in *United States v. Broadway*, 477 F.2d 991 (5th Cir. 1973) and its progeny* was not changed by the adoption of the Federal Rules of Evidence 403 and 404(b). We note the Fifth Circuit is presently reviewing the Beechum decision on petition for rehearing.

The Third Circuit has observed recently that "Rule 404(b) was in accord with the rulings of this circuit." *United States v. Goichman*, 547 F.2d 778 (3rd Cir. 1976) Goichman cited with approval a statement from a treatise that "Rule 404(b) merely codifies prior federal doctrine concerning evidence of past bad acts." Id at. 782.

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*See *United States v. Rice*, 550 F.2d 1364, 1372 (5th Cir. 1977), petition for cert. filed, 46 U.S.L.W. 3020 (July 26, 1977); *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977); *United States v. Taglione*, 546 F.2d 194 (5th Cir. 1977); *United States v. Adderly*, 529 F.2d 1178 (5th Cir., 1976); *United States v. Kirk*, 528 F.2d 1057 (5th Cir. 1976); *United States v. Urdiales*, 523 F.2d 1245 (5th Cir. 1975), cert. denied, 426 U.S. 920 (1976). See also *United States v. Bloom*, 528 F.2d 704 (5th Cir. 1976).

The Sixth Circuit in *United States v. Ailstock*, 546 F.2d 1285 (6th Cir. 1976) emphasized the similarity requirement in admitting evidence of other crimes. The court deemed it "a prerequisite" to the admissibility that "prior criminal acts referred to in the testimony be similar to those actually charged in the indictment." Id. at 1289. In so holding, the Sixth Circuit cited Rule 404(b) as well as cases both antedating and postdating the effective date of the rule.

The Ninth Circuit in *United States v. Rocha*, 553 F.2d 651 (9th Cir. 1977) stated that Rule 404(b) "codifies prior case law", the court cited cases both antedating and postdating the effective date of the federal rules.

In a slightly earlier Ninth Circuit decision, *United States v. Brashier*, 548 F.2d 1315 (9th Cir. 1976), affirming the trial court's judgment convicting the defendant, the Ninth Circuit held that evidence of similar concurrent investments was admissible to establish intent in the transactions giving rise to his prosecution. Again, the Ninth Circuit cited Rule 404(b) as well as cases antedating and postdating the effective date of the rule. The court established a tripartite test for determining the admissibility of evidence of prior acts. To be admissible, the court held that (1) such evidence must be "similar and close enough in time to be relevant", (2) the prior act must be established by "clear and convincing evidence, and (3) the probative value of such evidence must outweight its potential prejudice. Id. at 1325.

Opinions in other circuits at the time of the enactment of the Rules contain no indication of a change in the law effected by the enactment of Rule 404(b). See also *United States v. Barrett*, 539 F.2d 244 (1st Cir. 1976); *United States v. Fairchild*, 526 F.2d 185 (7th Cir. 1975), cert. denied, 425 U.S. 942 (1976). To the contrary the opinions indicate the Rule merely represents a codification of pre-existing law.

To confuse the issue even more, the commentators have given no indication that Rule 404(b) has changed the law. See J. Wigmore, *Wigmore on Evidence* 6c (3rd. Ed. 1977 Supp.); C. Wright, Federal Practice and Procedure 410 (1969 & 1977 Supp.); Report of American College of Trial Lawyers Committee to Study the Proposed Rules of Evidence IV(3) 1970; is Gard, Jones on Evidence 4.15 (1972, 1977 Supp.)

In conflict with the above Circuits the Eighth Circuit has held that a different rule of law is to be applied since the adoption of the Federal Rules of Evidence 403 and 404(b) — Under Rule 403, relevant evidence of other crimes is "excluded if its probative value is *substantially* out weighed by the danger of unfair prejudice..." Emphasis added. Before the enactment relevant evidence was excluded if "its probative value is substantially outweighed by the danger of unfair prejudice..." Moreover under the new rules "the trial judge may exclude (other crimes evidence) only on the basis of those considerations set forth in Rule 403, i.e., prejudice, confusion, or waste of

time." 5 Rep. No. 1277, 93d Cong., 2d Sess. 25 (1974); reprinted in (1974) U.S. Code Cong. & Ad. News. pp. 7051, 7071. See Note 2, *United States v. Maestas* for a history of the development of the law in the Eighth Circuit. Surely the prior case law with reference to the act's similarity in nature and the act's being closely related in time to those encompassed in the charge have not been completely erased by one fatal swoop of Congress. *Von Feldt v. United States*, 407 F.2d 95 (8th Cir. 1969); *Koolish v. United States*, 340 F.2d 513 (8th Cir. 1965); *Moses v. United States*, 297 F.2d 621 (8th Cir. 1961); *King v. United States*, 144 F.2d 729 (8th Cir. 1944); *Harper v. United States*, 143 F.2d 795 (8th Cir. 1944); *Brickey v. United States*, 123 F.2d 341 (8th Cir. 1941); *Patterson v. United States*, 361 F.2d 632 (8th Cir. 1966). This circuit is the only circuit which has so held to the knowledge of the petitioner.

2. Another important issue raised is: If the Federal Rules of Evidence 403 and 404 (b) do not constitute a new rule of decision, then whether and which standard applied in the various circuits prior to the adoption of the rules should be adopted by this court for uniform application? We respectfully submit that the standard evolved by case law in the Fifth Circuit should be so adopted by this court. In the Fifth Circuit a substantial body of law has developed requiring proof of "the essential physical elements of the offense charged with these elements being clearly proven by competent evidence". *United States v. Broadway*, Supra and its progeny, supra.

Broadway and its progeny were designed specifically to assess the probative value of the other crimes evidence against its prejudicial effect. This long line of Fifth Circuit cases provides a structured and principled framework for making these decisions. As noted in *Weinstein's Evidence:*

> "Yet some aid to fairness is afforded by analyzing each proffer of other crime proof to determine what evidential hypothesis the jury is expected to use, in weighing the probative force of the line of proof against the need of the prosecutor and the risk specified in Rule 403. The more reason there is to admit or exclude the more apt it is to be fair. Both bench and bar benefit at trial if critical questions of admissibility are exposed and the reasons clearly stated."

2. J. Weinstein and M. Berger, supra, ¶404(08).

Broadway and its progeny fill the need noted in the above quote. This long line of cases should not be discarded. Respectfully the conflict between the various circuits reference Pre-Federal Evidence Rules 403 and 404(b) standards should be resolved.

3. The present standard applied in the Eighth Circuit was not met by the Government.

In *United States v. Maestas*, 554 F.2d 834 (8th Cir. 1977) the continued viability since the enactment of the federal rules of the principles of *U. S. v. Clemons*, 503 F.2d 486, 491 (8th Cir. 1974) (authored by Circuit Judge Lay) was recognized. See *Maestas, supra*, Note 4. The possibility that a defendant might be convicted for a

crime not charged in the indictment on the basis of guilt by association concerned Judge Lay in *Clemons*. Of extreme concern there was that considerable time at the trial had been devoted to serving up the particular incident, with extensive questioning of two witnesses and the introduction of five photographs — prejudicing the defendant.

Recently, Circuit Judge Bright recognized and presumably applied the very principles of *Clemons*, *supra*. *U.S. v. Jones*, No. 77-1490, Feb. 16, 1978 (8th Cir. F.2 1978) Appendix H. Judge Bright presumably reasoned not only that there was prejudice in the amount of time and evidence required during the trial to develop the evidence of other criminal activity, overshadowing the principal case and confusing the jury, but that the evidence (in that case, prescriptions) constituted crimes or unlawful acts if they were only issued outside the bounds of professional medical practice. The burden of proof is on the Government to prove that the standard at the time of the commission of the other acts is similar, if not the same, as the standard at the time of the commission of the principal act, and the "other acts" were outside the bounds of the profession of the defendant. In the case at bar we note that the regulations in effect at the time of the alleged offense were *not* in effect at the time of at least two transactions introduced as same or similar acts.

Neither *Clemons*, supra, nor *Jones*, supra, was applied in this case; but there could not be a clearer case to which their application applies. Four same or similar

transactions, proof consisting of the two-part transaction of Weber-Bearden and Boothe of 28 exhibits with large demonstrative charts accompanied by handouts and six witnesses and of the Max Lasley transaction consisting of 22 exhibits with two demonstrative charts, accompanying handouts and four witnesses, were introduced. 50 exhibits with accompanying witnesses and charts, out of a total number of Government exhibits of 115, were used by the Government, as were the final two days of their case, to prove these acts that were limited to Counts I and V of the indictment. In addition, different regulations of the PCA were in effect for part of the Max Lasley transaction, which occurred in 1972, and for the initial part of the Weber-Bearden transaction, which occurred in 1972. The regulations in effect at the time of the indictment were not promulgated until the latter part of 1973 (Vii, T. 13, 17). No bad intent can be inferred from a transaction which was not against the regulations at the time it occurred—not outside the bounds of defendant's profession.

In addition the Government, by 28 exhibits with five large charts, handouts and 15 witnesses, attempted to prove the repurchase of 2,880 acres of the land by the defendants on Count III by limitation. We assert that no instruction of the court could have had that limiting effect. This evidence clearly confused the jury with reference to that which they could consider on which count. The same test (Rule 403) is to be applied here.

It is no answer that the trial court held three hearings on the admissibility of these transactions. The

demonstrative nature of the presentation of the evidence and the time taken to present that evidence was not revealed to the court or the defendant until proof was introduced. The District Court could not have applied the federal rules accurately.

VIII.

A directed verdict of acquittal should have been directed for petitioner Chambers on Count V — the §1014 violation, since the Government's proof lacked the essential element of scienter and the evidence was insufficient to show any connection of petitioner with the act alleged in Count V.

1. A conviction of a violation of §1014 should not be sustained in the absence of proof of mens rea. This Honorable Court has long recognized that the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo American criminal jurisprudence. *Dennis v. United States*, 341 U.S. 494 (1951), *American Communications Association v. Donds*, 339 U.S. 382, 411, (1950); *Smith v. People*, 361 U.S. 147 (1959); *Hamling v. United States*, 418 U.S. 87 (1974).

The Eighth Circuit Court of Appeals in *United States v. Steinhilber*, 484 F.2d 386 (8th Cir. 1973), a false statement case, heeded the wise words of Mr. Justice Blackmun while a member of the Eighth Circuit Court of Appeals that "carelessness or lack of wisdom is not equivalent to (a) knowledge of falsity..." *Jacobs v. United States*, 359 F.2d 960, 966 (8th Cir. 1966). There

Justice Blackmun held the Government's burden was not met and reversed the conviction since the meaning of the words in question was ambiguous and since the Government had the burden of negating the claim that the defendant "did not know the falsity of his statement at the time it was made or that it was the product of an accident, honest inadvertence, or duress," citing *Bryson v. United States*, 396 U.S. 64, 69-70, (1969).

In *United States v. Jones*, 545 F.2d 1112 (8th Cir. 1974) the Court relying on *Steinhilber supra* again overturned a conviction based on the absence of this important element knowingly.

The overwhelming proof in this case is that the term "crop loan" is not only ambiguous but the use of the term "crop loan" was not false or knowingly given. Testimony from the following farmers demonstrates that the use of "crop loan" was not false: Odus Chapman (Vix, T. 32), Walter Tinkle (Vix, T. 134), Donald Chapman (Vix, T. 137), Jim Malone (Vix, T. 140), Darrell Saul (Vix, T. 154), L.W. Morris (Vix, T. 157), A.S. Kelly, (Vix, T. 165) and Leroy Isbell (Vix, T. 173).

It is no matter that the petitioner was acquitted of this charge by the jury; the district court had a duty to direct a verdict of acquittal, and had it done so, the petitioner would not have been found guilty of any charges.

2. The decision of the Court of Appeals on the sufficiency of the evidence to submit the case to the jury is in direct conflict with the decisions of other circuits.

It is well-established in other circuits, as in the Eighth Circuit, that there must exist some affirmative participation which at least encourages the perpetration to support a conviction of aiding and abetting. *United States v. Crowdog*, 532 F.2d 1182 (8th Cir. 1976); *United States v. Thomas*, 469 F.2d 145 (9th Cir. 1972). That principle has been applied in a §2 and a §1014 case in *United States v. Kramer*, 500 F.2d 1185 (10th Cir. 1974), where the evidence to sustain a §2 violation was held to be insufficient.

The opinion of the Original Panel of the Eighth Circuit Court of Appeals stated the facts in the light most favorable to the Government (No. 77-1597 and 77-1601 at page 3, 8th Cir. 1978) Appendix B. The three references to Chambers do not support a conviction as an aider or abettor on Count V. In fact there is no competent evidence in the record to connect Chambers with the act alleged in Count V.

IX.

"Intent to defraud" as defined by the District Court in its closing instructions to the jury improperly defined the "intent" element of the offense a §1006 violation.

The Courts instruction if this case is not reversed, will become the standard "intent to defraud" instructions in every circuit in the United States in a §1006 case, and the courts instruction permits conflicts for acts not intended by a change of a violation of 18 USC §1006.

The Court instructed the jury as follows: (Vxi, T. 23)

> "You will note that one of the essential elements of the crime charged in Counts II, III and IV of the indictment is that the act of participating in, sharing in, or receiving moneys, profits or benefits through an act of the association be done 'with the intent to defraud the association.'
>
> 'Intent to defraud the association' means the intent to deceive or cheat the association or to deprive the association of some money, profit, property or benefit it is entitled to by virtue of its employment relationship with the defendant or by virtue of any transaction, loan, commission, contract or other act of the association.
>
> In this connection, the evidence need not show that the association suffered any financial loss or that it was actually defrauded; but only that the accused acted with the intent to defraud the association.
>
> An officer or an employee of the association has a duty not to knowingly serve interests which are adverse to those of the association. Such an officer or an employee has a duty to disclose to the association all material information that he has concerning transactions between the association

and its borrowers, including the obligation to disclose any personal or private interests that he might have in, or as a consequence of, such loan transactions.

By accepting employment with the association, an individual becomes obligated to perform his duties in accordance with those bylaws and governmental regulations which are in effect and which are known to him.

Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made or done by the defendant and all other facts and circumstances in evidence which indicate his state of mind.

In this regard I instruct you also that a defendant's compliance with or his failure to comply with the applicable regulations and by laws of the Lonoke Production Credit Association which were known to said defendant may be considered along with all the other evidence in determining the defendant's intent. As I have said, it is entirely up to you to decide whether to consider such evidence and if so, the weight and effect to give it."

Look at the following defects in this instruction in only this case. First, there was no evidence that the association had lost any money, profit or property, yet the court instructed on it. Secondly, the term benefit is vague and undefinable. What is a benefit? Black's Law Dictionary Rev'd 4th Edition defines benefit generally as

follows: "Advantage; profit; fruit; privilege...a pecuniary advantage or profit; gain; account; interest; the whole benefit and entire beneficial interest..." Compare these definitions with the balance of the instruction; that is, paragraph 3, wherein the instruction states that the evidence need not show that the association suffered a financial loss or was actually defrauded; rather only that the accused acted with the intent to defraud the association. Is a benefit a monetary loss or is it mere negligence or maladministration? If the latter, is that the law? Surely not. Yet on that evidence and under this instruction the jury could convict a defendant on mere negligence or maladministration.

Look at paragraph 4 and compare that paragraph with the regulations in force at the time at the Lonoke Production Credit Association. Government's Exhibit 11, Section g and h. Appendix K. The regulations only require that if there is a question about a transaction an employee should report to his immediate superior. There is no obligation to disclose all material information as the instruction would indicate. Note the conflict between paragraph 4 and paragraph 5. Paragraph 5 stating that an individual becomes obligated to perform his duties in accordance with those regulations which are in effect. The two paragraphs are in hopeless conflict. Similar conflicts would be present for any defendant in a §1006 case.

Defendant Chambers' Requested Instruction No. 23 was refused.

"To act with 'intent to defraud' means to act willfully, and with the specific intent to deceive or cheat; ordinarily for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself.

However, the evidence in the case need not establish that the United States or any person was actually defrauded, but only that the accused acted with the 'intent to defraud'.

An act is done 'willfully' if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law."

This instruction avoids the problems inherent in the Court's instruction. There is no chance that the defendant will be convicted under this instruction for negligence or maladministration. There are no vague terms such as benefit. There is no inherent conflict between the regulations and the instruction.

Defendant's Instruction No. 23 is the instruction recommended in both the 1970 Edition of Devitt and Blackmarr §16.06 and the 1977 Edition of Devitt and Blackmarr §16.05. Cited as authority for the instruction are the following cases:

United States v. Lepowitch, 318 U.S. 702, 704, 63 S.Ct. 914, 916, 87 L.Ed. 1091, reh. denied 319 U.S. 783, 63 S.Ct. 1171, 87 L.Ed. 1727 (1943);

Beck v. United States, 305 F.2d 595 (10th Cir. 1962), cert. denied 371 U.S. 890, 83 S.Ct. 186, 9 L.Ed. 123; *Beaudine v. United States*, 368 F.2d 417, 420 (5th Cir. 1966) appeal after remand 414 F.2d 397; *United States v. Thompson*, 366 F.2d 167, 170-173 (6th Cir. 1966), cert. denied 385 U.S. 973, 87 S.Ct. 412, 17 L.Ed.2d 436; *Releford v. United States*, 352 F.2d 36 (6th Cir. 1965) cert. denied 382 U.S. 984, 86 S.Ct. 562, 15 L.Ed.2d 473 (1966); cf. *Dennis v. United States*, 384 U.S. 855, 859, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966).

Cited with approval *United States v. Industrial Laboratories Co.*, 456 F.2d 908 (10th Cir. 1972).

Moreover compare the instructions given in *Beaudine v. U.S.*, 368 F.2d 417 (5th Cir. 1966) and *United States v. Peden*, 556, F.2d 278 (5th Cir. 1977) and *United States v. Industrial Laboratories Co.*, 456 F.2d 908 (10th Cir. 1972). These instructions are similar to defendant's requested instruction. All of them are much narrower in scope and without the ambiguities inherent in the court's instruction.

Respectfully, should this court not grant this petition for writ of certiorari, the instruction given by the court will set the standard for an instruction on "intent to defraud" to be used in the future in all circuits henceforth on a §1006 violation.

X. The proffered minutes of the Lonoke Production Credit Association were admissible and the trial court should have granted a continuance to Chambers to investigate the circumstances surrounding the minutes. Appendix F.

The decision of the Eighth Circuit Court of Appeals is inconsistent with this court's decisions of *Brady v. State of Maryland*, 373 U.S. 83 (1963), and *Moore v. Illinois*, 408 U.S. 786 (1972).

The minutes of the PCA were in the possession of the Government agents at one time (Vvi, T. 134) (Vvi, T. 137, 139). *U.S. v. Eley*, 335 F. Supp. 353 (N.D.Ga. 1972). This information should have been supplied in advance of trial. *U.S. v. Houston*, 339 F. Supp. 762 (N.D.Ga. 1972)

Moreover, C.K. Cardwell who was present at the meeting where the subject transaction was discussed would hav had the investigation made available to him (Vvi, T. 134). These minutes are a declaration of the governing board of the PCA that there was no criminal activity involved: A shorthand rendition of [the witness'] knowledge of the total situation and the collective facts. *U.S. v. McClintic, Jr.*, (No. 77-1174, 8th Cir. Jan., 13, 1978) authored by Senior District Judge Smith applying Rule 701 of Federal Rules of Evidence, Appendix J; *U.S. v. Freeman*, 514 F.2d 1184 (10th Cir. 1975). They should have been introduced.

At the least, a continuance should have been granted to investigate the circumstances.

CONCLUSION

The Opinion of the Eighth Circuit in this case can best be described as an "abuse of discretion" opinion. Many substantial questions of importance are thus raised by this Petition that were either not discussed or were treated in a limited fashion by the Court of Appeals.

Of utmost importance to the efficient administration of justice in these United States is the belief and faith of the citizenry that every individual will receive a fair and impartial trial and a due process review thereof in accordance with the established law of the land. All of these questions were squarely presented for review. This Petition should be granted.

Respectfully submitted,

DALE PRICE
211 Spring Street
Little Rock, Arkansas 72201

Attorney for Petitioner

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1978

NO. 78-328

JOE HENRY CHAMBERS..... *Petitioner*

vs.

UNITED STATES OF AMERICA..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX

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211 Spring Street
Little Rock, Arkansas 72201

Attorney for Petitioner

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
(Filed Nov. 1, 1976)

United States of America	)
	) No. LR-76-CR-154
v.	)
	) Count I-18 U.S.C. §371
Charles Thomas Griffin	) (NMT $10,000; NMT 5 yrs., or
Joe Henry Chambers	) both) Counts II, III and IV -
Bill Hansell	) 18 U.S.C. §1006
	) (NMT $10,000; NMT 5 yrs., or
	) both) Count V - 18 U.S.C.
	) §1014
	) (NMT $5,000; 2 yrs., or both)

INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

1. At all times material to this indictment:

a. The Lonoke Production Credit Association (PCA) was a federally chartered instrumentality of the United States with its central office located in Lonoke, Arkansas, under the supervision of the Federal Intermediate Credit Bank of St. Louis, St. Louis, Missouri and the Farm Credit Administration (FCA), also instrumentalities of the United States.

b. The East Lonoke Branch of the Lonoke PCA was located in Lonoke, Arkansas; its Branch Office Manager being BILL HANSELL, the defendant.

c. CHARLES THOMAS GRIFFIN, the defendant, was the President and a member of the Executive Committee of the Lonoke PCA.

d. JOE HENRY CHAMBERS, the defendant, was the Vice President of the Lonoke PCA.

e. O. M. Young was an attorney acting as trustee for the defendants.

f. Irving Brauer owned a 2,880 acre farm in Independence County, Arkansas.

g. Harold V. Huntsman was a borrower and member of the Lonoke PCA.

II. That from on or about the 1st day of June, 1974, and continuously thereafter up to and including the date of the return of this indictment, in the Eastern District of Arkansas and elsewhere, CHARLES THOMAS GRIFFIN, JOE HENRY CHAMBERS, and BILL HANSELL the defendants, wilfully and knowingly did combine, conspire, confederate and agree together with each other and with diverse other persons known and unknown to the Grand Jury to commit the following offense against the United States of America, to-wit: to wilfully and unlawfully participate, share in and directly and indirectly receive monies, profits and benefits from a purported crop loan, being officers and employees of the Lonoke Production Credit Association, a federally chartered body corporate and instrumentality of the United

States of America under the supervision of the Federal Intermediate Credit Bank of St. Louis, St. Louis, Missouri and the Farm Credit Administration, with intent to defraud said Association, in violation of Title 18, United States Code, Section 1006.

III. It was a part of said conspiracy that the defendants would cause Harold V. Huntsman to make a loan application to the Lonoke PCA in which false statements concerning the purpose of the loan were made.

IV. It was further part of said conspiracy that the defendants would cause a specified 2,880 acre farm in Independence County, Arkansas to be transferred from Irving Brauer to O. M. Young, acting as trustee for the defendants.

V. It was further part of said conspiracy that the defendants would cause Harold V. Huntsman's loan application to be approved by the Executive Committee of the Lonoke PCA only after agreement by Harold V. Huntsman to buy the said 2,880 acre farm in Independence County, Arkansas.

VI. It was further part of said conspiracy that the defendants would cause PCA loan proceeds to be advanced to Harold V. Huntsman.

VII. It was further part of said conspiracy that the defendants would cause Harold V. Huntsman to use part of the PCA loan proceeds to purchase the said

2,880 acre farm in Independence County, Arkansas, from O. M. Young, trustee.

VIII. It was further part of said conspiracy that the defendants would cause O. M. Young, trustee, to issue checks to each defendant drawn on an escrow account containing the PCA loan proceeds.

OVERT ACTS

In furtherance of the conspiracy and to effect the object thereof, the defendants performed the following overt acts:

1. On or abut the 18th day of July, 1974, in the Eastern District of Arkansas, the defendant BILL HANSELL, in his capacity as Branch Manager of the Lonoke Production Credit Association, took an application from Harold V. Huntsman for a $513,800 crop loan.

2. On or about the 18th day of July, 1974, in the Eastern District of Arkansas, the defendant CHARLES THOMAS GRIFFIN, in his capacity as President and voting member of the Lonoke Production Credit Association Executive Committee, approved the aforementioned crop loan.

3. On or about the 24th day of July, 1974, in the Eastern District of Arkansas, the defendant BILL HANSELL, in his capacity as Branch Manager of the Lonoke Production Credit Association, issued an

Association check in the amount of $386,600, payable to Harold V. Huntsman and Maudie Huntsman.

4. On or about the 24th day of July, 1974, in the Eastern District of Arkansas, the defendant BILL HANSELL accompanied Harold V. Huntsman to the First National Bank in Little Rock, Little Rock, Arkansas.

5. From on or about the 28th day of July, 1974 to on or about the 30th day of July, 1974, in the Eastern District of Arkansas, the defendant JOE HENRY CHAMBERS accepted a $20,000 check dated the 26th day of July, 1974, drawn on the escrow account of O. M. Young, attorney.

6. From on or about the 28th day of July, 1974 to on or about the 30th day of July, 1974, in the Eastern District of Arkansas, the defendant CHARLES THOMAS GRIFFIN, accepted a $71,000 check dated the 28th day of July, 1974, drawn on the escrow account of O. M. Young, attorney.

7. From on or about the 28th day of July, 1974, to on or about the 30th day of July, 1974, in the Eastern District of Arkansas, the defendant BILL HANSELL accepted a $71,000 check dated the 28th day of July, 1974, drawn on the escrow account of O. M. Young, attorney.

All of the above in violation of Title 18, United States Code, Section 371.

COUNT II

I. The Grand Jury realleges the allegations contained in paragraph I of Count I.

II. That on or about the 28th day of July, 1974, in the Eastern District of Arkansas, CHARLES THOMAS GRIFFIN, being President of the Lonoke Production Credit Association, a federally chartered body corporate and instrumentality of the United States of America, under the supervision of the Federal Intermediate Credit Bank (FICB) of St. Louis, St. Louis, Missouri, and the Farm Credit Administration, with intent to defraud said Association, did participate, share in and directly and indirectly receive monies, profits and benefits, that is the sum of $71,000 by means of and through the disbursement by the said Association of its check No. 60491, in the amount of $386,600, payable to Harold V. Huntsman and Maudie Huntsman, dated the 24th day of July, 1974, and purportedly representing proceeds of crop loan to Harold V. Huntsman and Maudie Huntsman, thereby violating the provisions of Title 18, United States Code, Section 1006.

COUNT III

I. The Grand Jury realleges the allegations contained in paragraph I of Count I.

II. That on or about the 26th day of July, 1974, in the Eastern District of Arkansas, JOE HENRY

CHAMBERS, being Vice President of the Lonoke Production Credit Association, a federally chartered body corporate and instrumentality of the United States of America under the supervision of the Federal Intermediate Credit Bank (FICB) of St. Louis, St. Louis, Missouri and the Farm Credit Administration with intent to defraud said Association did participate, share in and directly and indirectly receive monies, profits and benefits, that is the sum of $20,000 by means of and through the disbursement by the said Association of its check No. 60491, in the amount of $386,600, payable to Harold V. Huntsman and Maudie Huntsman, dated the 24th day of July, 1974, and purportedly representing proceeds of crop loan to Harold V. Huntsman and Maudie Huntsman, thereby violating the provisions of Title 18, United States Code, Section 1008.

COUNT IV

I. The Grand Jury realleges the allegations contained in paragraph I of Count I.

II. That on or about the 26th day of July, 1974, in the Eastern District of Arkansas, BILL HANSELL, being Branch Manager of the Lonoke Production Credit Association, a federally chartered body corporate and instrumentality of the United States of America under the supervision of the Federal Intermediate Credit Bank of St. Louis, St. Louis, Missouri and the Farm Credit Administration, with intent to defraud said Association did participate,

share in and directly and indirectly receive monies, profits and benefits, that is the sum of $71,000 by means of and through the disbursement by the said Association of its check No. 60491, in the amount of $386,600, payable to Harold V. Huntsman and Maudie Huntsman, dated the 24th day of July, 1974, and purportedly representing proceeds of crop loan to Harold V. Huntsman and Maudie Huntsman, thereby violating the provision of Title 18, United States Code, Section 1006.

COUNT V

I. The Grand Jury realleges the allegations contained in paragraph I of Count I.

II. That on or about the 16th day of July, 1974, in the Eastern District of Arkansas, CHARLES THOMAS GRIFFIN, JOE HENRY CHAMBERS and BILL HANSELL knowingly and wilfully did cause to be made a false statement in an application for a loan submitted by Harold V. Huntsman and Maudie Huntsman on said date to the Lonoke Production Credit Association, a federally chartered body corporate and instrumentality of the United States of America under the supervision of the Federal Intermediate Credit Bank of St. Louis, St. Louis, Missouri and the Farm Credit Administration, for the purpose of influencing the action of said Association to approve said loan, in that the defendant caused to be stated and represented in said application that request

was being made by Harold V. Huntsman and Maudie Huntsman for a crop loan in the amount of $513,800, whereas, in truth and fact, as the defendants then and there well knew, $292,319.18 was to be used to purchase 2,880 acres of real property in Independence County, Arkansas, thereby violating the provisions of Title 18, United States Code, Section 1014 and 2.

A TRUE BILL.

/s/ Tate Roberts

FOREMAN

/s/ W. H. DILLAHUNTY

W. H. DILLAHUNTY
United States Attorney

/s/ SAMUEL A. PERRONI

SAMUEL A. PERRONI
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

United States of America)

v. No. LR-76-CR-154

Joe Henry Chambers)

To[1] Any United States Marshal or other authorized Officer

You are hereby commanded to arrest Joe Henry Chambers and bring him forthwith before the United States District Court for the Eastern District of Arkansas in the city of Little Rock, Ark. to answer to an indictment charging him with Wilfully & unlawfully participated, share in and directly & indirectly receive monies, profits & benefits from a purported crop loan, being an officer & employee of the Lonoke Production Credit Assn., better described in the attached indictment.

1. Insert designation of officer to whom the warrant is issued, e.g., "any United States Marshal or any other authorized officer"; or "United States Marshal for _____District of_____"; or "any United States Marshal"; or "any Special Agent of the Federal Bureau of Investigation"; or "any United States Marshal or any Special Agent of the Federal Bureau of Investigation"; or "any agent of the Alcohol Tax Unit."

in violation of Sections 371 - 1006 - 1014 of 18 U.S.C.

Dated at Little Rock, Arkansas
on November 2nd, 1976

W. H. McClellan
Clerk
By /s/ Paul D. Shuffield
Deputy Clerk

Bail fixed at $5,000
Address: Route #3, Box 33
Carlisle, Arkansas

RETURN

_____District of_____ss_____

Received the within warrant the _____day of _____19____ and executed same.

_____

By_____

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 77-1597 and No. 77-1601

United States of America, *
*
Appellee, *
*
v. *
*
* Appeals from the United
Charles Thomas Griffin * States District Court for the
and Joe Henry Chambers, * Eastern District of Arkansas.
*
Appellants. *

Submitted: March 14, 1978
Filed: June 29, 1978

Before VAN OOSTERHOUT, Senior Circuit Judge, HENLEY, Circuit Judge and LARSON, Senior District Judge.*

*The Honorable Earl R. Larson, Senior United States District Judge, District of Minnesota, sitting by designation.

VAN OOSTERHOUT, Senior Circuit Judge.

On November 1, 1976, the federal grand jury returned a five-count indictment against Charles Thomas Griffin, Joe Henry Chambers and Bill Hansell. Not guilty pleas were entered. Upon a joint trial to a jury, commencing on June 20, 1977, defendant Griffin was found guilty on Counts I, II and V. Defendant Chambers was found guilty on Counts I and III and not guilty on Count V.[1]

Griffin and Chambers have each filed a timely appeal from their conviction. The defendants were jointly tried below and their cases are consolidated upon this appeal. Each defendant has filed separate briefs. Hansell has not appealed from his conviction.

Count I alleges a conspiracy on the part of the defendants to violate 18 U.S.C. §1006. Count II charges Griffin with violation of 18 U.S.C. §1006. Count III charges Chambers with violation of 18 U.S.C. §1006. Count IV involves a charge against Hansell not here material. Count V charges defendants with violation of 18 U.S.C. §§1014 and 2.

1. Griffin was sentenced to fifteen months imprisonment on each count, to be served concurrently, and was fined $10,000 on Count I, $5,000 on Count II and $5,000 on Count V. Chambers was sentenced to fifteen months imprisonment on each of Counts I and III, to be served concurrently, and was fined $5,000 on Count I and $2,500 on Count III.

Griffin relies upon the following points for reversal:

I. Prejudicial conduct of the Assistant United States Attorney in reading in part of his opening statement written statements given to Government investigators.

II. Failure to dismiss Count II as defective.

III. Failure to Dismiss Count V.

IV. Error in admitting evidence of repurchase of 2,880 acres.

V. Error in admitting evidence of other transactions.

VI. Error in permitting Boggess to testify.

VII. Failure to produce *Brady* material and denial of admission of certain minutes of Lonoke PCA.

Chambers makes the same contention with respect to Count III as Griffin does with respect to Count II. He also relies upon points I, III, IV, V, VI and VII asserted by Griffin. Such errors will be discussed jointly with respect to both appeals.

Chambers urges the following additional points:

VIII. Refusal to grant a severance.

IX. Error in instructions.

For the reasons hereinafter stated, we reject each of the contentions made and affirm the convictions.

The trial was a long one. The record is very extensive. A complete analysis of the facts and issues would unduly extend this opinion without serving a significant useful purpose. We shall summarize some of the pertinent facts bearing upon the issues raised. There is a dispute as to some of the material facts. However, in light of the jury verdict in favor of the Government, we view the evidence in the light most favorable to the Government as the prevailing party, and the facts are stated with this principle in mind. The Lonoke Production Credit Association (PCA) is a federally-chartered instrumentality of the United States under the supervision of the Federal Intermediate Credit Bank of St. Louis, Missouri, and the Farm Credit Administration. Griffin was president and Chambers was vice president of Lonoke PCA. Hansell was manager of the East Lonoke branch.

In 1973 Huntsman, a large farm operator, contacted Griffin in an effort to secure financing for his farming operations. Huntsman was told by Griffin that Hansell would take care of his needs. Huntsman was

unsuccessful in obtaining 1973 crops loans and had no success with his 1974 application. He was told St. Louis was fussing about Huntsman's not having sufficient farming operations in the Association's territory.

In July 1974 Hansell visited Huntsman and suggested the purchase of a 2,880 acre tract of land which Hansell said would make it easier for the PCA to give him his desired line of credit. Hansell said Griffin was waiting for a call to him of Huntsman's decision on the purchase and that PCA could finance 100% of the purchase price. Huntsman, with some reluctance, agreed to buy the land. A loan application for $513,800 was prepared and was signed by Huntsman. The application states the loan is a crop loan. The loan application was approved by the PCA loan committee of which Griffin was an influential member.[2]

The involved 2,880 acre farm was purchased by Griffin, Chambers and Hansell for $470,000 in late July of 1974 with title taken in the name of O. M. Young, Trustee.[3] The Brauer land was encumbered by existing encumbrances of $341,680 which were assumed by the purchasers with a balance of $129,000 to be paid in cash at the time of closing. Huntsman's

2. Real estate loans could be made by the PCA but the procedures for such loans differed significantly from those with respect to crop loans. Appraisals and title examinations were required for real estate loans.

3. It is not clear from the record whether defendants committed themselves to purchase the Brauer land prior to obtaining Huntsman's purchase agreement.

purchase price was $634,000, or $164,000 more than Brauer's selling price. The beneficial ownership of the land was not disclosed to Huntsman or to the supervising Government agencies.

On July 24, 1974, the PCA disbursed the proceeds of the crop loan, paying $121,433 for the release of a bank crop lien and issuing a check to Huntsman for $386,600.

Hansell refused to deliver the check for the loan proceeds to Huntsman, and at Hansell's insistence, Hansell and Huntsman went to the First National Bank in Little Rock where at Hansell's direction Huntsman endorsed and deposited the check for $386,600 and received a cashier's check made out to Young, Trustee, for $292,319.18, which was the amount due on the purchase above the assumption of existing encumbrances on the land. Hansell took possession of such check and delivered it to Young. The check was deposited to Young's trust account. Shortly thereafter Young issued a check on the trust account for $20,000 to Chambers and checks for $71,000 each to Griffin and Hansell. The remaining $2,000 was retained by Young as a fee. Telephone records were received in evidence showing numerous phone calls between Griffin and Young and others interested in the transaction on July 24 and that Young had a telephone conversation with Chambers on that date. Huntsman, after the payments hereinabove referred to, received a balance of about $80,000 to be used for crop loan purposes and had difficulty in meeting the expenses of his farming

operation. Huntsman in August 1974 received an additional crop loan of $125,000, and repeated efforts to obtain additional financing were unsuccessful.

On December 1, 1974, a payment on the indebtedness assumed by Huntsman became due. At the time of the purchase by Huntsman neither Brauer nor Huntsman knew that a $164,000 profit had been made on the sale, and Huntsman was not aware of the fact that defendants were the equitable owners of the real estate at such time. On March 7, 1975, Huntsman learned of the true ownership of the land which he purchased and the profit that had been made. The following day Huntsman visited Hansell and threatened to report the violation by the defendants of the conflict of interest statute and regulation. Hansell admitted that a profit had been made on the deal and that it was unlawful for the PCA officers to do what they had done, urged Huntsman not to go to the FBI, and stated that he would comply with anything Huntsman asked. Shortly thereafter a meeting was held between Hansell, Huntsman and Boggess wherein Boggess agreed to buy the farm for $662,000, which was approximately Huntsman's purchase price. Boggess brought Huntsman an option agreement and a $25,000 check drawn on the account of O. M. Young. On March 25, 1975, the purchase of the farm was completed with Boggess paying Huntsman and the PCA $302,000, which was credited on Huntsman's debt to PCA. The balance of the repurchase was the assumption of the existing mortgage indebtedness.

The Huntsman-Boggess closing took place in Young's office with Chambers, Young, Boggess and Huntsman and his attorney being present. It is established that Griffin, Chambers and Hansell put up the money for the Boggess purchase and induced Boggess to give a false statement to Government investigators with respect to his involvement in the purchase. The PCA loan was paid in full, and no money was lost by PCA as a result of the Huntsman loan. Additional facts to the extent necessary will be set out in the course of the opinion.

We shall now consider the asserted errors in the order hereinabove stated.

I.

Defendants urge that the Assistant United States Attorney engaged in improper conduct during opening argument when he read portions of the signed statement of each defendant to the jury upon the basis that any conspiracy which might have existed was terminated prior to the giving of the statements to the Government investigator and that consequently the statements were inadmissible to the extent that they involved defendants other than the defendant making the statement. At that point no motions had been made to suppress the statements. The statements had been furnished defendants as part of the discovery procedure. No objection was made at the time the statements were read nor was a motion for mistrial on

that ground made. Such failure precludes raising the claimed error upon appeal. *See United States v. Lawson*, 483 F.2d 535, 538 (8th Cir. 1973); *United States v. DeRosa*, 548 F.2d 464, 471-72 (3d Cir. 1977). Moreover, Griffin's attorney in opening statement admitted nearly all of the facts referred to in Griffin's statement concerning the purchase and sale of the farm but denied criminal intent. The statement of each defendant admitted the receipt of profits in the substantial amounts shown in the Young disbursements hereinabove.

Before defendants' statements were admitted in evidence all references to codefendants were deleted, and the jury was advised that statements of counsel did not constitute evidence. We are satisfied that no prejudicial error was committed with respect to the attorney's opening statement. *See United States v. Powell*, 564 F.2d 256, 259-60 (8th Cir. 1977); *United States v. Killian*, 524 F.2d 1268, 1273-75 (5th Cir. 1975).

II.

The contention of defendants that the allegations of Count II of the indictment as to Griffin and Count III as to Chambers, charging violation of 18 U.S.C. §1006, are fatally defective lacks merit. Four elements are required to be proved in order to establish a violation of Title 18 U.S.C. §1006. They are: (1) that the defendant is an officer or employee of a lending institution organized under the laws of the

United States; (2) that the defendant participated, shared in or received, either directly or indirectly, money, profit or benefit by and through any transaction of such institution; (3) that the defendant did such act or acts with intent to defraud the association; and (4) that such act or acts were done knowingly and wilfully. *United States v. Hykel*, 461 F.2d 721(3d Cir. 1972).

Counts II and III of the indictment tell the appellants exactly what they were supposed to have fraudulently received, and the exact transaction involved, *i.e.*, the disbursement of an Association check in the amount of $386,600 payable to Harold and Maudie Huntsman which purportedly represented the proceeds of a Huntsman crop loan.

In *United States v. Brown*, 540 F.2d 364, 371 (8th Cir. 1976), we held:

> An indictment must set forth in factual terms the elements of the offense sought to be charged. It must sufficiently apprise the defendant of what he must be prepared to meet, and its generality must not endanger his constitutional guarantee against double jeopardy. (Supporting citations omitted.)

The record in our present case clearly reflects that the defendants were fully aware of the charges against them and that their double jeopardy rights are fully protected.

III.

Both Griffin and Chambers urge that the court erred in denying their timely motions for acquittal on Count V. This count alleges that the defendants knowingly and wilfully violated 18 U.S.C. §§1014 and 2 in that they caused Huntsman to make a false statement that the loan applied for was a crop loan when in fact they knew that a major portion of the loan was to be used to purchase the 2,880 acres, and that they thereafter approved the loan, or that they aided and abetted in such transaction. Our examination of the record satisfies us that there is substantial evidence to support the charge. Griffin was convicted on Count V. Chambers was acquitted on Count V. The case against Griffin, who was a member of the committee that approved the loan, is stronger than that against Chambers.

Chambers further contends that the refusal to dismiss Count V permitted the reception of evidence that would have been excluded if the dismissal motion had been granted.

We hold that the court committed no error in submitting Count V to the jury.

IV.

The court committed no error in admitting buy-back evidence relating to the 2,880 acres with respect

to Counts II and III. Admission of evidence is committed to the broad discretion of the trial court and the trial judge's ruling should not be disturbed absent a clear showing of abuse of discretion. *United States v. Baumgarten*, 517 F.2d 1020, 1029 (8th Cir. 1975). The buy-back evidence was relevant and material on the issue of knowledge and intent with respect to Counts II and III. See Rules 401-402, Federal Rules of Evidence. The court by proper instruction limited consideration of the buy-back evidence to Counts II and III. Accordingly, we need not reach the Government's contention that the evidence was admissible as to Count I.

V.

Defendants challenge the admission of evidence concerning other similar transactions. Rule 404(b). Federal Rules of Evidence, provides:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This court in *United States v. Maestas*, 554 F.2d 834, 836 (8th Cir. 1977), held:

> Our task is to assess the relevancy and the probative value of the challenged evidence; if it meets the requirements of Rule 404(b) we may not reverse the ruling of the District Court unless we also find that the prejudice from admitting the evidence substantially outweighed its probative value. In making that evaluation, we give great deference to the district judge, who saw and heard the evidence.

The record reflects that the trial court held three hearings on the admissibility of the other transactions evidence and was advised, as was defense counsel, of the general facts surrounding each transaction. The defense had several months to meet the proposed evidence. The court limited the prosecution to similar transactions which involved land deals in which Griffin and Chambers were involved, where loan proceeds were used in whole or in part to buy land in which Griffin and Chambers had an interest and where deception and concealment were involved. Our examination of the record satisfies us that the trial court did not abuse its discretion in admitting the challenged evidence.

VI.

Boggess was a straw man used by the defendants to re-purchase the 2,880 acres from Huntsman. Boggess had refused to testify before the grand jury on the basis of self-incrimination. He was ultimately granted immunity by appropriate proceedings. Defendants contend Boggess should not be allowed to testify since he had attended several

meetings of defendants with their counsel. At such time Boggess was represented by the same attorney who represented Hansell and he attended the meetings at the attorney's request. The court, upon the basis of substantial evidence at an in camera evidentiary hearing, found Boggess was not a Government informer or spy and that he did not disclose any defense strategy to the Government. Both Boggess and the Government specifically denied any disclosure of defense strategy to the Government.

Defendants further complain that they did not learn of the grant of immunity until the fifth day of the trial and that such information should have been disclosed earlier in order to enable defendants to propose questions on voir dire as to whether they would consider the granting of immunity in determining the credibility of a witness. We find such contention lacks merit. Defendants knew for a considerable time that Boggess had been subpoenaed by the Government as a witness. Defendants had an opportunity to argue to the jury the bearing of the immunity on Boggess' credibility. Boggess' testimony was very damaging to the defendants. He stated that he had had several conferences with Griffin, Chambers and Hansell and that he was their friend. He said that he acted as purchaser at defendants' request and that all the money for the repurchase was provided by the defendants. We disagree with defendants' contention that Boggess' testimony, which was admitted only with respect to Counts II and III, had no relevancy to such charges. We also disagree with the claim that the

relevancy is substantially outweighed by danger of unfair prejudice.

VII.

Defendants at several stages filed motions for disclosure of material favorable to the defense. The claimed favorable material is contained in the PCA minute book and reads as follows:

> Gentlemen, Mr. McGuire explained that an FCA investigation team had discovered that violations of FCA rules and regulations apparently have been committed and that the employment of Charles Griffin and Bill Hansell had been terminated. He was direct, emphatic and explicit that criminal violations were not involved.

Mr. McGuire was the president of the Federal Intermediate Credit Bank of St. Louis. The record reflects that neither the Government nor its investigators had possession or knowledge of such minutes and that they were discovered when the minute books were produced on the fifth day of the trial. The minutes disclose information unfavorable to the defendants in that Griffin had been discharged for violation of association rules. The favorable portion of the minutes was that McGuire expressed the bald assertion that criminal violation was not involved. The tender of the quoted minutes was denied upon the ground that it constituted an inadmissible conclusion

of the witness. It is doubtful whether the expression of an expert opinion on guilt or innocence can be given by a witness. Such issue is appropriately determined by the jury under appropriate instructions by the court.

In any event, the statement was made some three months before the indictment. McGuire was not shown to be in possession of all the facts nor was he shown to be an expert qualified to pass on the criminal guilt issue. The court committed no error in determining that there was no *Brady* violation and did not abuse its discretion in refusing to admit the tendered extract from the minutes. The trial continued for nine days after the defendants' knowledge of the minutes and a four-day recess intervened. The court properly denied a continuance as ample time remained for the defendants to make any desired investigation as to the subject matter of the minutes.

VIII.

Chambers complains of the court's denial of a severance. Chambers participated in the same transactions as his co-defendants. Joinder was proper under Rule 8(b), Federal Rules of Criminal Procedure. In *United States v. King* and *United States v. Lewis*, 567 F.2d 785, 788 (8th Cir. 1977), we held no abuse of discretion arose from the denial of Lewis' motion for severance. We stated:

> Even if joinder is proper under Rule 8, Fed.R.Crim.P. 14 authorizes the trial court to grant relief from joinder "[i]f it appears that a defendant or the government is prejudiced by [the] joinder . . . ." The court "may order . . . separate trials of courts, grant a severance of defendants or provide whatever other relief justice requires." *See United States v. Sanders*, 563 F.2d 379, at 382 (8th Cir. 1977). A district court in determining whether to grant relief under Rule 14 has wide discretion and the court's ruling is rarely disturbed on review.

We find no abuse of discretion on the part of the trial court in denying Chambers' motion for severance.

IX.

Chambers contends the court's instructions on intent to defraud the association are inadequate and erroneous. Chambers also contends the court erred in refusing to instruct on his theory of defense. We have reviewed the court's instructions on intent to defraud as a whole and find no prejudicial error was committed. As stated in *United States v. Hykel*, 461, F.2d 721, 724 (3d Cir. 1972), quoting with approval from *Beaudine v. United States*, 368 F.2d 417 (5th Cir. 1966):

> [T]his part of 18 U.S.C. §1006: "is intended to do much more than forbid unsophisticated embezzlement, larceny or theft. And that part of the statute with which we are concerned is a typical conflict of interests prohibition. As such it is a congressional recognition of the principle so well grounded in morality and equity that the servant cannot serve two masters and that when this is done without complete disclosure,

> the law considers that the master-principal's interests either will, or are apt to, suffer."

Chambers complains of that part of the instructions which states that the evidence need not show that the PCA suffered any financial loss and that a showing that the accused acted with intent to defraud is sufficient. The Government suffered no financial loss as the loan was repaid. As stated in *Hykel, supra* at 725:

> The fact that Havertown and the United States may have suffered no loss through the transaction does not preclude a finding of intent to defraud.

The court's instructions in the present case clearly place the burden on the Government to show an intent to defraud beyond a reasonable doubt. Defendants had signed statements that they were familiar with the applicable regulations relating to conflict of interest. The evidence here clearly shows a conflict of interest and supports a finding of intent to defraud a Government agency by not revealing the conflicting interests to the supervising agencies. Defendant's contention that the court erred in failing to submit his theory of the case lacks merit. The tendered defense that Chambers is a licensed real estate agent and that the $20,000 received on the sale was a commission finds no support in the evidence. The evidence reflects that the sale was negotiated by Hansell and that Chambers had nothing to do with the selling except to acquiesce in the sale and accept his share of the profits.

The extensive record developed at a lengthy trial and the numerous errors asserted make it impractical to discuss all facts and issues in greater detail. No useful purpose would be accomplished by a more detailed discussion of the facts and issues. We have fully considered all of defendants' contentions including those not discussed and are convinced that the defendants had a fair trial, that substantial evidence supports the jury verdicts, and that no prejudicial error was committed by the trial court nor did it abuse its discretion upon issues lying within its discretion.

The convictions are affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

77-1597 September Term, 1977

United States of America,)
Appellee,)

vs.)

Charles Thomas Griffin,)
Appellant.)

77-1601 Appeals from the United States
District Court for the
Eastern District of Arkansas

United States of America,)
Appellee,
)
Joe Henry Chambers,)
Appellant.)

The Court having considered petitions for rehearing en banc filed by counsel for appellants and, being fully advised in the premises, it is ordered that the petitions for rehearing en banc be, and they are hereby, denied.

Considering the petitions for rehearing en banc as petitions for rehearing, it is ordered that the petitions for rehearing also be, and they are hereby, denied.

July 28, 1978

APPENDIX D.

"I, Charles Griffin, make the following statement freely and voluntarily to John J. Hickey who has identified himself to me as an examiner, Farm Credit Administration, knowing that it may be used in evidence.

"I am 47 years old and live at 517 Northwest 3rd Street, Lonoke, Arkansas. I was employed by the Lonoke Production Credit Association, PCA, in 1952 and became its president in 1958. I discussed purchasing a 2,880 acre farm in Independence County, Arkansas, and decided I would be interested. It was agreed that I would share in the venture. This was an oral agreement. Contact was made with a local insurance company to borrow enough money to purchase the property. In the meantime Mr. Harold Huntsman, a PCA borrower, had become interested in purchasing the farm and he agreed to buy it for an acceptable price.

"The contract for the sale and purchase of real estate was drawn up whereby Irving Brauer sold the 2,880 acres to O. M. Young, trustee. This contract shows that it was entered into on July 24th, 1974, by Irving Brauer and O. M. Young, trustee. Mr. Young acted as our attorney. I don't know who negotiated the contract with Mr. Brauer. I was not familiar with the terms of this contract except that I knew the purchase price was $470,000.00.

"A contract was drawn up on July 25, 1974, whereby O. M. Young, acting as trustee for Mr. Boggess as well as the rest of our group, sold the farm to Harold Huntsman for $634,000.00. Here again I was not familiar with the terms of this contract.

"Since we had a buyer for the property soon after it was purchased from Mr. Brauer, we did not have to put up any money on the purchase from Mr. Brauer. There were debts on the property which our group assumed from Mr. Brauer. Accordingly, Mr. Huntsman assumed the same debts on the sale of the property to him. Examiner Hickey has shown me where Mr. Huntsman made a cash payment of $292,319.18 which was turned over to Mr. Young for disbursement. I don't recall the exact amount Mr. Huntsman paid in cash, but that figure looks about right. Mr. Haley can furnish a complete breakdown of the $128,319.18. However, the disbursements to me are correct and represent the percentage of the profit previously agreed upon. Mr. Boggess was entitled to his share, but said he did not need the funds right then and was willing to wait for his share until a later date.

"At this point we had no cash invested in the property above debt assumption and had received the above distribution of profits on the sale of the farm to Mr. Huntsman.

"I have never had any direct dealings with Mr. Huntsman until last Friday when he came to the PCA office to discuss a new loan he needed. Under our

operating procedures, the branch office manager servicing a particular area serves as the direct contact with borrowers.

"I had no discussion with Mr. Huntsman concerning the purchase of the 2,880 acres in July 1974. In early 1975 I learned that Mr. Huntsman was not satisfied with the purchase of the farm. It was agreed to buy the property back from Mr. Huntsman for $327,000.00 cash and assume debts, giving him a profit. I talked to Franklin Collier about the property and he agreed to provide interim financing of $187,000.00 for six months or less. This amount was insufficient to buy the property back. I, therefore, provided $70,000.00, Boggess provided $40,000.00. Our checks and the money obtained from Mr. Collier were turned over to Mr. Haley for handling and disbursement. Mr. Haley then issued his escrow check to Mr. Huntsman and the PCA for $302,000.00 which was applied against his loan. Mr. Huntsman had previously been paid $25,000.00 by Mr. Boggess on an option agreement entered into when it was decided to buy the farm back from Mr. Huntsman. Mr. Haley has the exact receipt and distribution of the funds involved. Mr. Collier's loan was for only a short term. I put up additional collateral to secure Mr. Collier.

"The 2,880 acres of land was later sold to Dr. James Weber in the fall of 1975. I am not sure how this sale was handled or how the funds received from Dr. Weber were disbursed. Mr. Haley can furnish this

information. As I recall, the farm was sold to Dr. Weber for about $680,000.00. I have not received any distribution of any funds from this sale. $120,000.00 in additional funds borrowed from Travelers Insurance Company were required to close the sale and ha e sufficient funds to pay Collier. In connection with this sale, Mr. Weber and I entered into a written agreement whereby if the farm sold for more than Dr. Weber paid for it, the profits would be divided as shown in a memorandum of agreement dated October—no specific date—'75. At this point, Mr. Boggess was out of the picture with respect to any ownership although I still owe him his portion of the profits.

"I am familiar with the $513,800.00 crop loan to Mr. Huntsman applied for on July 16, 1974, as a member of the Executive Committee. I have no knowledge of how Mr. Huntsman used the funds disbursed on this loan and assume he used them for the purpose stated on the application.

"To my knowledge, Mr. Huntsman was not coerced into purchasing the 2,880 acre farm but I don't believe he was aware that we had an equity interest in the farm.

"The only other land transaction I was involved in was about five years ago when I purchased a tract of land in Yell County, Arkansas, from a party who was not at that time a PCA borrower. I do not recall his name. I later sold the property to a non-PCA member

who later became one of our borrowers. I found out about this farm being available through James McCann, a PCA member.

"The only discussions I recall having with Federal Intermediate Credit Bank, FIBC, personnel concerning Mr. Huntsman pertained to his loans with PCA. There was never any discussion concerning the 2,880 acre farm in Independence County or whether any PCA personnel were involved in that property.

"I don't know where Mr. Huntsman obtained the funds to purchase the 2,880 acre farm and do not feel I violated any rules or regulations by having financial dealings with PCA members.

"I have read this statement consisting of four typewritten pages and it is true and correct. I have been given the opportunity to make any corrections and have signed or initialed each page."

It contains the signature of Charles Griffin, dated 7/23/76 with a handwritten addendum by Mr. Griffin.

"To my knowledge, I received no down payment on the property sold to Dr. Weber and no PCA funds were involved."

APPENDIX D-2

"I, Bill Hansell, make the following statement freely and voluntarily to R. H. Whitman and John J. Hickey who have identified themselves to me as examiners, Farm Credit Administration, knowing that it may be used in evidence.

"I am 39 years old and reside at 303 Southeast 9th Street, England, Arkansas. I was employed by the Lonoke Production Credit Association—PCA in brackets—as fieldman in June 1973 and later became branch office manager stationed in the Lonoke office.

"Jimmie Boggess, a PCA borrower, told me he knew of a farm that could be purchased in Independence County, Arkansas, and wanted to know if I was interested in going in on the deal with him. Mr. Boggess did not say who he was buying the farm from and I didn't know who the seller was until quite some time later. I don't recall how I learned who the seller was. I have known Mr. Boggess for a long time and respect his judgment, so when he recommends something like this I go along with him.

"I am not familiar with the contract for sale and purchase of real estate dated July 24, 1974, in which Irving Brauer sold 2,880 acres of land in Independence County to O. M. Young, trustee. I assume Mr. Young was acting as trustee for Mr. Boggess. I never discussed this with Mr. Boggess.

"This was the land that the four of us entered into as a joint venture. Mr. Boggess interested Mr. Huntsman in the purchase of the property and the two of them agreed on a price. I had no contact whatsoever with Mr. Huntsman to purchase the 2,880 acres that Mr. Boggess had acquired. The only knowledge I had of the contract between O. M. Young, trustee, as seller, and Harold V. Huntsman, as buyer, was that I notarized the form. This contract is dated either July 24th or July 25, 1974.

"All I knew about the selling price to Mr. Huntsman was from information shown on the contract. Mr. Young was acting as trustee for Mr. Boggess on the sale to Mr. Huntsman and he, Mr. Young, handled the receipt and disbursement of funds. Mr. Huntsman was never told that I had an equity in the property that he purchased. As far as Mr. Huntsman was concerned Mr. Boggess was in the deal alone.

"I took Mr. Huntsman's loan application dated July 16, 1974 and the entries made thereon are in my handwriting. This application is for $513,800.00 for a crop loan. I disbursed two checks to Mr. Huntsman on July 24, 1974. One was for $121,433.33 issued jointly to Mr. Huntsman and the Bank of McCrory. The other check was issued to Harold and Maudie Huntsman for $386,600.00. I handed the checks to Mr. Huntsman and do not know how the proceeds were used. Approval of this loan was subject to assignment of the contract on the 2,880 acres. Such an assignment was subsequently

received from Mr. Huntsman. Although an assignment was obtained, I don't recall getting it. I have never heard of no trouble in getting the assignment.

"I have been in the First National Bank, Little Rock, a couple of times with Mr. Huntsman, but do not recall the circumstances. I have no recollection of accompanying Mr. Huntsman to the First National Bank so he could obtain a cashier's check from his loan proceeds so he could make a payment on the 2,880 acres he had acquired. I don't know what funds Mr. Huntsman used to purchase the property.

"Because Mr. Boggess had found a buyer so soon, I had no money invested in it. I did receive a check for $71,000.00 on July 26, 1974, which represented my share of the profits on the sale of the farm to Mr. Huntsman. I don't know how the other shares were divided. My check came from Mr. Young. Frankly, I was surprised to receive so much.

"In the winter of 1974 or early spring 1975, Mr. Huntsman called me and said he had a buyer for the farm in Independence County who was willing to pay about $800,000.00 and wanted to know if the PCA would finance the buyer. Mr. Huntsman offered to co-sign the note along with the buyer if a loan was made. I told Mr. Huntsman that there was no way the PCA could make the loan because his endorsement of the note would jeopardize his line of credit. Mr. Huntsman was angry. The reported buyer, whose name I do not recall, then called me and asked about

financing. I told him that the farm was out of our territory, but he could bring his papers over to the office and I would discuss the loan with the executive committee. The man never showed up and did not make application for a loan with the PCA.

"After this incident, or about the spring of 1975, Mr. Huntsman called me and told me to get in touch with that boy in Coy, Arkansas—who was Mr. Boggess—to see if he would buy the 2,880 acre farm back. Mr. Huntsman told me all he wanted was his money back, but that I should not tell Mr. Boggess that. I called Mr. Boggess and told him that Mr. Huntsman wanted to sell it back but did not state what Mr. Huntsman wanted. I had no other contact with Mr. Huntsman concerning the sale of the farm until a meeting was set up in a restaurant in Beebe, Arkansas. I don't recall the date of this meeting, but it was in the spring of 1975.

"Present at the restaurant besides myself were: Messrs. Boggess and Huntsman, Mrs. Huntsman and their son, and another party whom I do not know. At this meeting Boggess and Huntsman excused themselves and went out to the car. I believe Mr. Huntsman's son also went to the car. I joined them briefly in their discussions in the car. Messrs. Boggess and Huntsman entered into an option agreement for Mr. Boggess to repurchase the farm. Mr. Boggess later paid Mr. Huntsman $25,000.00 in connection with the option. Mr. Huntsman still wanted to sell the farm because he needed the money.

"I told Mr. Boggess a few days after the meeting that we had done wrong in dealing with a PCA member and we had better buy the farm back and give Mr. Huntsman a profit. As far as I know, Mr. Boggess borrowed the necessary funds to repurchase the farm from Franklin Collier, but I do not know what arrangements were made with Mr. Collier or how much was borrowed from him.

"Mr. Huntsman was given a check for $302,000.00 through John Haley, an attorney, who was handling the paper work for Mr. Boggess. Mr. Huntsman brought the check to the PCA and wanted me to release the funds to him. The check had been issued jointly to Mr. Huntsman and the PCA. I told Mr. Huntsman I could not release the funds because the PCA had a mortgage on the place. The proceeds were applied on Mr. Huntsman's loan.

"After the property was purchased from Mr. Huntsman, I backed out of the joint venture and was no longer involved. I understood the property was subsequently sold by Mr. Boggess to Dr. James Weber. Although I had not returned any of the $71,000.00 I had received on the sale of the property to Mr. Huntsman, I considered that I had returned it because I did not share in any further profits from the sale of the land to Dr. Weber. I know that it was wrong in having financial dealings with borrowers and have learned a valuable lesson. I would not want to disgrace the PCA.

"I have read this statement consisting of four typewritten pages and it is true and correct. I have been given the opportunity to make any additions or corrections and have signed and initialed each page.

"Signed: Bill Hansell, July 22, 1976."

APPENDIX D-3

"I, Henry Chambers, make the following statement freely and voluntarily to R. H. Whitman and John J. Hickey who have identified themselves to me as examiners, Farm Credit Administration, knowing that it may be used in evidence.

"I am 39 years old, married, and live on Route 3, Box 33, Carlisle, Arkansas 72024. I was employed in June 1961 by the Federal Intermediate Credit Bank, FICB, St. Louis, Missouri, as a fieldman under an apprenticeship program and served in four production credit associations, PCA, before being assigned permanently to the Lonoke PCA. I was a credit man at the PCA and my title was later changed from assistant secretary-treasurer to vice president in charge of credit. My employment with the PCA was recently terminated. I farm approximately 1,000 acres of land.

"I became involved in the purchase of a 2,880 acre farm in Independence County, Arkansas, in 1974. It was my understanding that Jimmie Boggess had found some land for sale and asked if I wanted to go in

with him on the purchase. In my opinion the land was a bargain as far as land values go. About 60 to 70 days elapsed between the time the land was available and the date we purchased it. The land was purchased on a contract for sale and purchase of real estate dated July 24, 1974, with Irving Brauer the seller and O. M. Young acting as trustee for the buyer. Mr. Brauer does not have a PCA loan and I did not know him personally. My interest in the property at the time it was purchased from Mr. Brauer was about twelve and-a-half percent.

"The 2,880 acres was purchased from Mr. Brauer for $470,000.00 and we were to assume the outstanding debts on the property of $341,680.82. This left about $129,000.00 that had to be paid to Mr. Brauer. We did not have to come up with any money at the time because somebody found a buyer for the farm in Mr. Huntsman. The property was sold to Mr. Huntsman for $634,000.00 on a contract for sale and purchase of real estate dated July 25, 1974. Mr. Young acted as trustee for our group on the sale of the property to Mr. Huntsman. I am sure Mr. Huntsman did not know that PCA employees had an interest in the property he purchased. Mr. Huntsman assumed the same debts that were on the property we had assumed from Mr. Brauer. The proceeds collected from Mr. Huntsman were used to pay the balance due Mr. Brauer and I received $20,000.00 for my approximately twelve and-a-half percent interest. I did not see a closing statement and do not know how much each of the others received.

"Later on Mr. Huntsman became displeased with his purchase and called and expressed his displeasure, and it was decided that Mr. Boggess should offer to repurchase the 2,880 acres from Mr. Huntsman. This was done at the agreed price of $662,000.00 with our group to again assume the outstanding debts on the property at the time of repurchase. I don't recall the exact amount our group had to put up to repurchase the property, but it was around $327,000.00. It was my understanding that Mr. Boggess initially entered into an option agreement with Mr. Huntsman whereby Mr. Boggess paid Mr. Huntsman $25,000.00 for the option. I saw a copy of the option agreement. In order to repurchase the property, I put up $30,000.00 which I borrowed from the Citizens Bank of Carlisle and the balance from the funds I had on hand. These checks were turned over to Mr. Haley for distribution from his escrow account. Mr. Haley paid the interest due on the debts we had assumed and issued a check jointly to Mr. Huntsman and the PCA for $302,000.00.

"Mr. Huntsman had obtained a crop loan from the PCA in July of 1974 and had obtained other advances and had assigned his purchase contract as partial security. He had nothing to do—I had nothing to do with this loan and do not know how Mr. Huntsman used the funds. When we repurchased the property from Mr. Huntsman in March of 1975, Mr. Haley called and asked me to bring PCA'S RELEASE OF ASSIGNMENT TO HIS OFFICE. I then took the release to Mr. Young's office. I don't remember if I

picked up the check for $302,000.00, but it was applied to his PCA loan. To my knowledge I visited with Mr. Huntsman only twice. One time I inspected his farm on one of his loans and the other time was when I saw him at the closing in Mr. Young's office. I had no discussion with Mr. Huntsman on the purchase or sale of the 2,880 acres.

"Dr. James Weber is active in farming and is always looking for farm land as an investment. He was interested in purchasing the 2,880 acres from us. Dr. Weber agreed to pay about $700,000.00 for land, less closing costs. Dr. Weber was also to assume the remaining debts on the property. At the time negotiations were being made to sell the farm to Dr. Weber, I visited with him. We had an oral agreement at this time that should Dr. Weber sell the property at more than his purchase price, he, Dr. Weber, would get one-third of the profits, I would get one-third of the remaining two-thirds of the profits. Should the farm sell at a loss, we would share the loss in like proportions. However, in my opinion the property is worth about a million dollars and that someday Dr. Weber will be able to sell the property at this figure. No one in the area can afford to pay that much for the farm, but outside investors are always looking for farm land to buy. I have no doubt that we will make a nice profit on the subsequent sale of this property.

"There were no profits distributed on the sale of the property to Dr. Weber. Additional interest had accrued on debts on the property which had to be paid

and Mr. Collier was repaid for his loan. I borrowed $40,000.00 from the Travelers Life Insurance Company at the time Dr. Weber purchased the property. This money was paid into Mr. Haley's escrow account as a further investment.

"I have read this statement consisting of three typewritten pages and it is true and correct. I have been given the opportunity to make any additions or corrections and have signed or initialed each page."

APPENDIX E

I, Jimmie H. Boggess, make the following statement freely and voluntarily to R. H. Whitman, who has identified himself to me as an Examiner, Farm Credit Administration, knowing that it may be used in evidence.

I live in England, Arkansas, and raise cotton, soybeans, and rice. I have been a member of the Lonoke Production Credit Association, Lonoke, Arkansas (PCA) for many years.

In 1974 I learned that a Mr. Irvin Brauer was asking $470,000 for a 2880 acre farm located in Independence County, Arkansas. Although I had not been on the farm, I thought from its location it was worth a great deal more that he was asking. I knew that Mr. Harold V. Huntsman of Bald Knob, Arkansas, was always looking for land to purchase, so I called him. I told him I knew of a farm in Independence County that could be purchased for $650,000 and asked him if he was interested. After looking at it, he called me back and said he thought it was worth no more than $634,000. After talking it over, we agreed on a price of $634,000. I then had my attorney, Mr. O. M. Young draw up a trust agreement whereby I authorized him to act for me as trustee in connection with the purchase of the farm from Brauer for $470,000, and the sale the following day to Mr. Huntsman for $634,000 for a net profit before expenses of $164,000. I did not have to pay down any money in connection with the

purchase because I was reselling it at a profit. To the best of knowledge I did not give or receive a warranty deed to the property. Both transactions were handled by sales contracts. I do not remember how much money I received from Mr. Young, the escrow agent, but his records would show the disposition of the funds, and I would have to ask him about it.

In 1975 I learned that Mr. Huntsman was not satisfied with the farm. I do not remember if he called me and told me or if I learned from Bill Hansell of the PCA. Anyway, Mr. Hansell and I drove to Beebe, Arkansas, one evening, and met Mr. and Mrs. Huntsman at a restaurant. After talking about the matter, I told Mr. Huntsman that I would repurchase the 2880 acres for $662,000, if he would give me a $25,000 purchase option. I then drew up a handwritten option to this effect, and gave him a $25,000 check drawn payable to Harold V. Huntsman by Mr. O. M. Young, my attorney. I felt the farm was worth much more than I was paying for it, and would be able to again sell it at a profit. I called it my "million dollar farm".

In connection with the repurchase of the farm from Huntsman, I borrowed $302,000 from Mr. Franklin Collier, of Augusta, Arkansas. I believe he took a second mortgage on the place to secure the debt. I later on sold the place in the fall of 1975 to Dr. James R. Weber, M.D. of Jacksonville, Ar. for $700,000. Attorney John Haley handled the details of the sale to Weber, and I do not know how he financed it.

No PCA employees were involved in connection with the above transactions, and had no interest in the property.

I never offered to lend Mr. Huntsman any money on his 17,000 acre farm for 90 days in return for a deed to his property. I am not in the lending business. I have to borrow money to run my farming business. I applied for a $200,000 PCA loan on February 26, 1975, to purchase a farm in Lonoke County, Arkansas, that Roy and Orlan Roper were farming. However, they later exercised their option to purchase the property, and I did not get the PCA loan.

I have read this statement consisting of two typewritten pages and it is true and correct. I have been given the opportunity to make and additions or corrections and have initialed or signed each page.

Witness:
/s/ R. H. Whitman, Examiner
Farm Credit Administration
St. Louis, Mo. 63141

/s/ Jimmie H. Boggess
Box 9
Coy, Arkansas 72051

APPENDIX F
(Opening Statements)
(T. 23-30)

Hansell then called the investigators later on that day and told them he couldn't make it, but an appointment was set up for July 21, 1976. Thereafter, Hansell signed a statement which stated, among other things, these things: Hansell stated that he, Boggess and Griffin and Chambers decided to take shares in the purchase of this farm in Independence County, Arkansas; that Boggess, Griffin and Hansell were to take about 29 percent interest and that Chambers was to take about a four percent interest, and that these percentages were based upon the risk they were going to take. They had some risks involved, and these percentages were based upon the risks.

He was not familiar with the contract of sale between Brauer and Young and he assumed—assumed—that Young was acting as trustee for Boggess. He then stated that Boggess interested Huntsman in the purchase of the property and the two of them—that is, Boggess and Huntsman—agreed upon a price. He stated that he had no contact whatsoever with Mr. Huntsman to purchase this land and that the only knowledge that he had on the contract between O. M. Young and Harold Huntsman was that he had notarized that contract.

He also stated that Huntsman was never told that he, Griffin, and Chambers had an equity in the property that Huntsman purchased. Hansell stated that he took care of Huntsman's loan applications and disbursed the checks which made up the $513,800.00.

Hansell stated he did not know how the proceeds were used. Hansell stated he had no recollection of accompanying Huntsman to the First National Bank so he could obtain a cashier's check from the Huntsman PCA loan proceeds in order to make the down payment on the property.

Hansell added again that he did not know what funds Huntsman used to purchase the property. Hansell stated that because Boggess found a buyer for the property so soon, that he, Hansell, had no money invested in the land whatsoever but that he did receive a check for $71,000.00, which represented his share of the profits on the sale of the farm to Huntsman.

Hansell stated he did not know how the other shares were divided. Hansell further stated that in the spring of 1975 Huntsman called and told him to get in touch with Boggess to see if Boggess would buy back the land. Hansell stated that Huntsman told him all he wanted was his money back. Hansell called Boggess, told him that Huntsman wanted to sell the farm back to him but did not state what Huntsman wanted for the farm. Hansell then stated he had no other contact with Huntsman concerning the sale of the farm until a meeting was set up between Huntsman and Boggess.

It was during this meeting that Huntsman and Boggess entered into the option agreement. Hansell stated later that Boggess paid Huntsman $25,000.00 in connection with this option. Thereafter Hansell told Boggess that, "We had done wrong in dealing with a PCA member and that we had better buy the farm back and give Mr. Huntsman a profit."

Hansell stated that as far as he knew, Boggess borrowed the funds to repurchase the farm from Huntsman. After the property was purchased back from Huntsman, Hansell stated that he backed out of the venture and was no longer involved.

Finally, Hansell ended his statement by saying he knew it was wrong to have financial dealings with PCA borrowers and that he had learned a valuable lesson.

After being advised of his constitutional rights, Chambers stated in his statement, which was signed on July 23, 1974 (sic.) among other things these things: that he became involved in the purchase of the Independence County farm when Griffin and Hansell invited him to join in the purchase. It was his understanding in talking to Griffin and Hansell that Boggess had found some land for sale and asked if they wanted to go in with him, Boggess, on the purchase.

The land was purchased on a contract of sale dated July 24, 1974, with Irving Brauer selling and O.

M. Young acting as trustee for all of the buyers. His interest in the profit at that time it was purchased from Brauer was about 12 and a half percent. The other three buyers held equal shares.

They had only an oral agreement with regard to the sharing of the profit, and his interest was less than the others because, and I quote, "He could not stand a greater financial exposure at the time."

He said further they didn't have to put any money into the property because somebody found a buyer in Harold Huntsman. The property was then sold to Huntsman for $634,000.00 on July 25, 1974.

He again stated that Huntsman (sic.) acted as trustee for all of them on the sale of the property to Huntsman. Proceeds, he stated, were collected for Huntsman and used to pay the balance to Mr. Brauer, and he received $20,000.00 for his approximate 12 and a half percent interest. He didn't know, he stated, what the other people received.

Chambers then stated Huntsman became displeased with his purchase and called one of the three individuals to express his displeasure. The group decided Huntsman—excuse me, Boggess should offer to repurchase the 2,880 acres of land from Huntsman.

He stated that the repurchase was accomplished and the group had to put approximately $337,000.00 and assume the outstanding debts on the

property. Chambers stated it was his understanding that Boggess initially entered into an option agreement for the $25,000.00.

Chambers also stated that he put up $30,000.00 for the repurchase and Griffin put up $70,000.00. Chambers also stated that Griffin and Boggess made arrangements with a man by the name of Franklin Collier to borrow the balance making up the repurchase of $187,000.00. Chambers states further that Huntsman obtained a crop loan from the PCA in July of '74 and he didn't know how Huntsman used the funds.

Chambers had no discussions with Huntsman regarding the purchase or the sale of the 2,880 acres. After the purchase by the group, the land was transferred to Dr. James Weber at a price of $700,000.00 and at the time of the negotiations he and Griffin and Weber entered into an agreement whereby Chambers—the defendant Chambers and the defendant Griffin would receive one-third of the profit if the farm was sold for an amount exceeding what Dr. Weber paid for it and would also share in one-third of the losses if the property was sold for an amount less than what Dr. Weber paid for it.

Now with regard to the defendant Charles Griffin. he gave a signed statement and also gave oral information to the investigators, and that signed statement is dated July 23, 1976. His statement

reflects, among other things, that he, Chambers, Hansell, and Boggess discussed purchasing a farm in Independence County and that it was agreed that Boggess, Hansell and Griffin would share the venture and that Chambers would have about a 15 percent interest. This was all done orally; nothing in writing.

While they were attempting to borrow enough money to purchase the property, Mr. Harold Huntsman became interested in purchasing the farm and agreed to purchase it for a "acceptable price". The contract of sale was drawn up whereby Brauer sold the farm to Young as trustee on July 24, 1974, and Young was acting as their attorney.

Griffin stated that he did not know who negotiated the contract with Irving Brauer. Thereafter, Griffin stated that a contract was drawn up on July 25, '74, whereby Young, acting as trustee for he, Boggess, Chambers and Hansell, sold the farm to Harold Huntsman for $634,000.00.

Griffin stated he was not familiar with the terms of the contract. Griffin stated that the disbursements from Young's account were correct and represented the percentage of profits they had previously agreed upon.

Griffin further stated that Boggess was entitled to his share—was entitled to his share, but that he did not need the funds right then and was willing to wait for his share until a later date.

Griffin further stated that he talked to Franklin Collier about a $187,000.00 loan and believed that Boggess and Chambers obtained the loan from Collier. In addition, Griffin provided $70,000.00. he stated Boggess provided $40,000.00, and the balance of $30,000.00 came from Chambers to repurchase this farm.

Griffin stated further that Boggess paid Huntsman $25,000.00 for an option agreement entered into when it was decided to buy the farm back from Huntsman, and then he stated later that the land was later sold to Weber and the same agreement was in effect when Mr. Chambers stated in effect about the sharing of profits and the sharing of losses.

Griffin then stated he had no knowledge of how Huntsman used the funds disbursed on the loan and assumed he used them for the purpose stated on the application.

He then added this—which was in a signed statement that he prepared. You will hear testimony that he prepared the statement. —that the only other land transaction that he was involved in was about five years before the time of the interview when he purchased a tract of land in Yell County from a party who was not a PCA borrower. Griffin stated that he found out about the Yell County farm from James McCann who was a PCA member.

Finally, Griffin stated that he did not know where Huntsman obtained the funds to purchase the Independence County farm and did not feel he violated any rules or regulations by having financial dealings with PCA members.

APPENDIX G

MINUTES OF THE LONOKE PRODUCTION CREDIT ASSOCIATION DATED JULY 26, 1976 (DEFENDANTS' EXHIBIT aa)

"Gentlemen, Mr. McGuire explained that an FCA investigation team had discovered that violations of FCA rules and regulations apparently have been committed and that the employment of Charles Griffin and Bill Hansell had been terminated. He was direct, emphatic and explicit that criminal violations were not involved." (Vvi, T. 127)

APPENDIX H

UNITED STATES v. BELL No. 1894

(8th Cir. April 19, 1978)
Submitted: February 13, 1978
Filed: April 19, 1978

Before MATTHES, Senior Circuit Judge, LAY, Circuit Judge, and HANSON,* District Judge.

MATTHES, Senior Circuit Judge.

Michael Bell, appellant, and Mario Burkhalter, apparently a friend or at least an acquaintance of appellant, were jointly indicted for transferring two sawed-off shotguns without paying the transfer tax required by 26 U.S.C. §5811,[1] in violation of 26 U.S.C.

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*The Honorable William C. Hanson, Senior District Judge for the Southern District of Iowa, sitting by designation.

1.
27 U.S.C. §5811 provides in pertinent part:

> There shall be levied, collected, and paid on firearms transferred a tax at the rate of $200 for each firearm transferred . . . . The tax imposed . . . shall be paid by the transferor.

§5861[2] and 18 U.S.C. §2.[3] Bell was tried alone, found guilty by a jury, and committed to custody under the Federal Youth Corrections Act, 18 U.S.C. §5010(b), until discharged by the United States Parole Commission, as provided by 18 U.S.C. §5017(c). On appeal, Bell contends that the district court erred in declining to propound requested *voir dire* questions; admitting certain testimony; commenting on the evidence; and omitting requested instructions. We affirm.

A brief resume of the background facts will serve to place the contentions of appellant in proper perspective. On February 22, 1977, two federal undercover agents were taken by Mario Burkhalter to appellant's apartment for the purpose of purchasing illegal firearms. Appellant testified that before the agents and Burkhalter arrived, Burkhalter had the

---

2
26 U.S.C. §5861 provides in pertinent part:

It shall be unlawful for any person—

....

(e) to transfer a firearm in violation of the provisions of this chapter . . . .

3.
18 U.S.C. §2(a) provides:

Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

same day "dropped the rifles off in a multi-colored blanket all wrapped," and that appellant "threw" them into his closet. However, appellant informed the agents that he did not have the guns there, but that they would probably "be here later on tonight." He also testified that he had "sort of whispered" in Burkhalter's ear to come back alone.

Later that evening, Burkhalter, accompanied by the agents, returned to appellant's apartment. According to the agents, appellant removed two sawed-off shotguns from a closet and displayed them on a bed. After satisfying themselves that the guns were in working order, the agents paid appellant a total of $110 for them. Appellant denied receiving any money from the agents. Burkhalter was paid $40 as a "finder's fee" by the agents.

Appellant attempted to persuade the jury by his testimony to find, in effect, that Burkhalter induced him to participate in the sale of the guns as a precondition to Burkhalter's payment of a debt of $45 owed to appellant. Thus, it is apparent that because of the differing versions of what transpired, the jury, of necessity, was required to pass upon the credibility of the testimony of the agents vis-a-vis the credibility of appellant as delineated in his testimony.

It is undisputed that appellant did not pay a transfer tax on the weapons. he claimed that he had no knowledge about the $200 transfer tax, and that he was willing to pay the tax "at the present time."

I

Appellant is a black man. The jury before which he was tried was white. On *voir dire*, the district court asked the prospective jurors the following questions:

> Do any of you have any prejudices about giving a fair trial to a person of a minority race?
>
> Have any of you had any untold experiences with black people, any experiences that would be unusual of any kind that might shade your thinking in a situation of this kind?
>
> Do any of you think that you might give more credibility to the testimony of a witness who was white than to a witness who was black?

Appellant requested that the *voir dire* include nineteen additional questions, all but one of which concerned race. The district court denied appellant's request. Appellant contends that the district court's refusal to ask the requested *voir dire* questions was reversible error. We disagree.

Voir dire questions concerning race are not *constitutionally* required unless the circumstances in the case "suggest a significant likelihood that racial prejudice might infect [the defendant's] trial." *Ristaino v. Ross*, 424 U.S. 589, 598 (1976). *Ristaino* involved the trial of a black man for violent crimes against a white security guard. Because race was not an issue at trial, the Supreme Court affirmed the trial court's refusal to

voir dire potential jury members concerning their racial attitudes.

In the present case, as in *Ristaino*, the issue of race was not "inextricably bound up with the conduct of the trial." *Id.* at 597. Consequently, the district court was under no *constitutional* obligation to probe prospective jurors for signs of racism.

Of course, a federal court does have a *non-constitutional* duty to inquire as to possible racial bias on the jury panel when the defendant is a member of a racial minority group. *Aldridge v. United States*, 283 U.S. 308 (1931); *United States v. Powers*, 482 F.2d 941, 944 (8th Cir. 1973), *cert denied* 415 U.S. 923 (1974). That duty was fulfilled in the case at bar, however. The questions concerning race which the district court propounded demonstrated a proper exercise of discretion. *See United States v. Hamling*, 418 U.S. 87, 140 (1974); *United States v. Thompson*, 490 F.2d 1218, 1222 (8th Cir. 1974).

II

A. Coconspirator's Statements.

At trial, the undercover agents, over appellant's objection, related the substance of telephone conversations with Mario Burkhalter during which the sale of the shotguns was arranged. Appellant contends that the agents' testimony was hearsay and therefore improperly admitted. The

government urges that the statements were admissible as declarations of a coconspirator under FED. R. EVID. 801(d) (2) (E).

It is well-established that an out-of-court declaration of a coconspirator is admissible against a defendant if the government demonstrates (1) that a conspiracy existed; (2) that the defendant and the declarant were members of the conspiracy; and (3) that the declaration was made during the course and in furtherance of the conspiracy. *See United States v. Lambros*, 564 F.2d 26, 30 (8th Cir. 1977); *United States v. Frol*, 518 F.2d 1134, 1136-37 (8th Cir. 1975); *United States v. Sanders*, 463 F.2d 1086, 1088 (8th Cir. 1972); FED. R. EVID. 801(d) (2) (E). The new Federal Rules of Evidence have caused subtle but significant changes in the way that rule is applied, however. *See United States v. Petroziello*, 548 F.2d 20, 22-23 (1st Cir. 1977). In particular, the admissibility of an alleged coconspirator's statement is now a preliminary question for the judge, not the jury, to decide. FED. R. EVID. 104;[4] *United States v. Petroziello, supra;* but

4.
FED. R. EVID. 104 provides in pertinent part:

> (a) Questions of admissibility generally. Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (b) Relevancy conditioned on fact. When the relevancy of evidence depends on the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

see Kessler, The Treatment of Preliminary Issues of Fact in Conspiracy Litigation: Putting the Conspiracy Back Into the Coconspirator Rule, 5 Hofstra Law Review 77 (1976). This shift in the relative functions of the judge and jury has occasioned a reevaluation of the level and type of proof necessary to demonstrate a defendant's involvement in a conspiracy sufficiently to admit a coconspirator's statement. *See* 1 WEINSTEIN'S EVIDENCE ¶104 [05] at 104-39-44 (1977); Bergman, The Coconspirator's Exception: Defining the Standard of the Independent Evidence Test Under the New Rules of Evidence, 5 Hofstra Law Review 99 (1976).

Previous cases in this circuit required that the conspiracy be proved by "substantial independent evidence . . . ." *United States v. Scholle*, 553 F.2d 1109, 1117 (8th Cir. 1977); *See United States v. Frol, supra* at 1136. Other decisions spoke in terms of a "prima facie case of conspiracy . . . ." *United States v. Anthony*, 565 F.2d 533, 536 (8th Cir. 1977); *United States v. Lambros, supra* at 30 n. 4. These formulations were appropriate "when the jury ha[d] the last word . . . ." *United States v. Petroziello, supra* at 23. But because the district court's determination of the admissibility of a coconspirator's statement is final under FED. R.EVID. 104, we have concluded that a different standard of proof is now required. *See id.* at 22-23; see generally *United States v. Lambros, supra.* It is not necessary, however, that a defendant's complicity in a conspiracy be proved beyond a reasonable doubt for a statement

to be admissible under FED. R. EVID. 801(d) (2) (E). *United States v. Petroziello, supra* at 23. The ordinary civil standard of preponderance of the evidence is sufficient since the district court is ruling on admissibility rather than ultimate guilt. *Id.*

It has been suggested that the new Federal Rules of Evidence have altered the requirement that the admissibility of a coconspirator's statement be determined on evidence exclusive of the statement itself. *See, e.g., United States v. Martorano*, 557 F.2d 1, 11-12 (1st Cir.), rehearing denied, 561 F.2d 406, 408-09 (1977), cert. denied, 46 U.S.L.W. 3586 (U.S. March 21, 1978) (No. 77-603); *Bergman, supra* at 105. We believe that the requirement of independent evidence is an important safeguard, however, and therefore adhere to our traditional rule. *See Glasser v. United States*, 315 U.S. 60, 74-75 (1942); *United States v. Lambros, supra.* Accordingly, we hold that an out-of-court statement is not hearsay and is admissible if on the independent evidence the district court is satisfied that it is more likely than not that the statement was made during the course and in furtherance of an illegal association to which the declarant and the defendant were parties.

For the purpose of providing guidance to the district courts in future trials, we submit that the following procedural steps should be utilized when the admissibility of a coconspirator's statement is at issue, regardless of the nature of the charge or charges:

(1) If the prosecutor propounds a question which obviously requires a witness to recount an out-of-court declaration of an alleged coconspirator, the court, upon a timely and appropriate objection by the defendant, may conditionally admit the statement. At the same time, the court should, on the record, caution the parties (a) that the statement is being admitted subject to defendant's objection; (b) that the government will be required to prove by a preponderance of the independent evidence that the statement was made by a coconspirator during the course and in furtherance of the conspiracy; (c) that at the conclusion of all the evidence the court will make an explicit determination for the record regarding the admissibility of the statement; and (d) that if the court determines that the government has failed to carry the burden delineated in (b) above, the court will, upon appropriate motion, declare a mistrial, unless a cautionary instruction to the jury to disregard the statement would suffice to cure any prejudice. *See United States v. Stanchich*, 550 F.2d 1294, 1298 (2d Cir. 1977). The foregoing procedural steps should transpire out of the hearing of the jury. *See* FED. R. EVID. 104(c).

(2) After a ruling on the record that the out-of-court declaration is admissible under Rule 801(d) (2) (E), the court may submit the case to the jury. The court should not charge the jury on the admissibility of the coconspirator's statement, but should, of course, instruct that the government is required to prove the ultimate guilt of the defendant beyond a reasonable doubt. An appropriate instruction

on credibility should be given, and the jury should be cautioned with regard to the weight and credibility to be accorded a coconspirator's statement.

In the present case, appellant complains that the district court never made the requisite determination on the record that Burkhalter's statements were admissible under FED. R. EVID. 801(d)(2)(E). An explicit, on-the-record finding of admissibility has never previously been required in this circuit, however. *See United States v. Kelley*, 526 F.2d 615, 619 n.3 (8th Cir. 1975), cert. denied, 425 U.S. 914 (1976). Moreover, appellant failed to request the finding he now contends was necessary. Given the dearth of appellate guidance on point, the absence of a formal finding of admissibility was not plain error. *See United States v. Martorano, supra*, 557 F.2d at 11; FED. R. CRIM. P. 52(b). There was compelling independent evidence that appellant and Burkhalter conspired to sell firearms without payment of the required transfer tax. The agents testified that Burkhalter, for a fee, introduced them to appellant and arranged for appellant to sell them the shotguns. They further testified that both appellant and Burkhalter were present when the purchase price and a portion of the "finder's fee" were paid. In addition, the statements admitted against appellant were clearly made during the course and in furtherance of the

conspiracy.[5] In short, the government unquestionably met its burden of demonstrating the admissibility of Burkhalter's statements. Consequently, the lack of an on-the-record determination of admissibility did not affect any substantial rights of appellant. See FED. R. CRIM. P. 52(b).

B. Testimony on the Purpose of the Gun Control Act.

On redirect examination by the prosecutor, one of the undercover agents testified concerning the statutory purpose of the Gun Control Act of 1968, 18 U.S.C. §921 *et seq.* Over repeated defense objections, the following was elicited:

5.
One agent testified as follows:

> [Burkhalter] inquired as to whether I would be interested in purchasing two sawed off shotguns and discussed the fee that he would receive for lining up the sale.
>
> . . .
>
> It was agreed that he would receive twenty dollars for each firearm if I were allowed—or if I were introduced to the party that had them for sale.
>
> . . . .
>
> [Burkhalter] said that when he had finally lined the sale up he would contact me again or contact us, my partner and myself.

The other agent testified concerning a second phone conversation:

> [Burkhalter] indicated to me that he was in contact with the person that had two sawed off shotguns for sale and wish[ed] to sell them to us.

> [Sawed-off shotguns] are considered gangster type weapons, sir, because of their concealability and their use in impact upon persons.
>
> ....
>
> [T]hey are readily concealable, but at the same time they afford the person carrying the firearm a great amount of fire power, and as they are five shot weapons, and they do fire shotgun shell which is a very good antipersonnel type projectile.
>
> ....
>
> [B]ecause of the shortened barrel, the shot pattern, when the shot is fired, and the shotgun shell pellets go down the barrel they tend to spread out at a very fast rate so they can cover a very large area and strike a great many objects in a wide area at short range.

This testimony had little or no probative value on any issue at trial. *See United States v. Williams*, 545 F.2d 47, 50-51 (8th Cir. 1976). Since the prejudicial impact of the testimony substantially outweighed its probativeness, the district court erred in admitting it. FED. R. EVID. 403; *see United States v. Mejia*, 529 F.2d 995, 996 (9th Cir. 1976) (per curiam). In view of the strength of the case against appellant, however, we hold that the district court's error was harmless. *See* FED. R. CRIM. P. 52(a); FED. R. EVID. 103(a); *see generally Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946).

III

Appellant next contends that the district court erroneously instructed the jury on aiding and abetting a violation of 26 U.S.C. §5861(e) by omitting any reference to specific intent. We find no merit in appellant's argument.

Specific intent is not required for a violation of 26 U.S.C. §5861(e). *United States v. Thomas*, 531 F.2d 419, 421-22 (9th Cir. 1976; *United States v. DeBartolo*, 482 F.2d 312, 314-17 (1st Cir. 1973); *see United States v. Freed*, 401 U.S. 601, 607 (1971). It would be anomalous to hold that specific intent was a necessary element of aiding and abetting a crime, but not of the crime itself. In the present case, it was enough that appellant *knowingly* participate in the sale of the shotguns, and the district court so instructed the jury.[6] *See Nye & Nissen v. United States*, 336 U.S. 613, 620 (1949); *cf. United States v. Kelton*, 446 F.2d 669, 670 (8th Cir. 1971) (similar instructions).

6.
The district court instructed the jury as follows:

> [T]he law is in order to find a person guilty of a crime you need not find that he did every single thing about the crime. If he aided or assisted in some knowing way and participated in it as something he wanted to do, then he, too, is involved in the crime. If you are in on the act you are in on the crime, and I think that's the government's second bow there that even if you didn't believe that the actual transfer was made by this defendant to the two agents, he was still acting as an aider and abettor in the crime.

Finally, appeliant complains of prejudicial comments by the district court in the charge to the jury. Specifically, appellant contends that the district court improperly mentioned the reasons for Burkhalter's absence from the trial. Appellant also asserts that the district court's comments on the evidence of appellant's failure to pay a transfer tax effectively directed the verdict on that issue. We have carefully reviewed the district court's comments and find no error affecting the substantial rights of appellant.

Appellant's conviction is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX I

UNITED STATES v. JONES No. 1490
(8th Cir. Feb. 16, 1978)
Submitted: October 10, 1977
Filed: February 16, 1978

Before GIBSON, Chief Judge; BRIGHT, Circuit Judge; and TALBOT SMITH, Senior District Judge.*

BRIGHT, Circuit Judge.

Augustin Jones, a physician practicing in St. Louis, Missouri, appeals a conviction for intentionally distributing Quaalude, a Schedule II controlled substance,[1] in violation of 21 U.S.C. §841(a)(1) (1970).[2]

*TALBOT SMITH, United States Senior District Judge, Eastern District of Michigan, sitting by designation.

1.
A drug or other substance listed in Schedule II has "a high potential for abuse," has "a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions," and is a drug or substance the abuse of which "may lead to severe psychological or physical dependence." 21 U.S.C. §812 (b) (2) (1970). 21 C.F.R. §1308.12(e) (1977) provides that drugs containing specified depressant substances are listed under Schedule II. No dispute exists that Quaalude is a depressant-type drug listed under Schedule II.

2.
21 U.S.C. §841 (a) (1) 1970) provides in pertinent part:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense * * * a controlled substance[.]

Dr. Jones was charged with two counts of prescribing Quaalude without a legitimate medical purpose and outside the usual course of professional practice: count I related to a prescription written by Dr. Jones on January 10, 1977, and count II related to a second prescription written on February 9, 1977. The jury acquitted Dr. Jones on count I but convicted him on count II. We reverse the conviction.

On this appeal, Dr. Jones contends that the district court erred in admitting evidence of alleged similar acts in prescribing Quaalude, and, in addition, Tuinal, Preludin, Desoxyn, and Dilaudid, other Schedule II drugs. Dr. Jones also contends that the prosecution did not produce sufficient expert medical evidence on which to base a conviction.

We hold that the district court erred in permitting the Government to introduce evidence concerning 478 prescriptions for Schedule II drugs, allegedly issued by Dr. Jones to his patients, as evidence of other crimes bearing upon Dr. Jones' knowledge and unlawful intent in prescribing drugs as charged in the indictment.

I. The Evidence at Trial.

In order to place the admission of the contested evidence in appropriate context, we summarize the evidence introduced at the two-day trial. The indictment stemmed from the efforts of St. Louis policemen who, posing as patients, visited Dr. Jones

in order to obtain prescriptions of Schedule II drugs, specifically Quaalude, a depressant, or Preludin, an amphetamine sometimes used for the purpose of facilitating weight loss. In late November or the early part of December 1976, officer Antone Wagner of the St. Louis Metropolitan Police Department, who worked as an undercover agent in the Narcotics Division, went to Dr. Jones' office. In the waiting room of the office he observed five other persons between the ages of twenty and thirty-five. Officer Wagner asked Dr. Jones for a prescription for Preludin, which Wagner indicated he needed for weight control. Dr. Jones asked Wagner for his reference, and Wagner responded with the name of Linda Couch. Stating that he did not recall Linda Couch, Dr. Jones declined to prescribe Preludin for Wagner.

On January 10, 1977, the St. Louis Police Department made a further effort to obtain Schedule II drugs from Dr. Jones. On that date, Larry Wells, a police officer on assignment to the Drug Enforcement Administration, went to Dr. Jones' office under the assumed name of Tony Ventimiglia and told the physician that one Ricky Feldman had said that he (Wells) could obtain a prescription for Quaalude from Dr. Jones. Officer Wells testified that Dr. Jones took some information from him and then gave him a prescription for thirty Quaalude tablets. Wells paid ten dollars for this medical service and was told by Dr. Jones to try Gross Drugs in St. Louis if he had any trouble getting the prescription filled. In fact, Gross

Drugs would not fill the prescription, but Wells obtained the medication from another pharmacy in St. Louis. Dr. Jones' version of the session, while substantially in accord with the testimony of officer Wells, added that Wells had stated that he worked on the production line at the Chrysler plant, that the work was tiring, and that he needed something for sleep. Count I of the indictment rests upon this January 10th incident. As we have already noted, the jury returned a not guilty verdict on this count.

Officer Wells returned to Dr. Jones' office on February 9, 1977.[3] He identified himself by his assumed name and was escorted by Dr. Jones into the latter's office. In the conversation that ensued, Dr. Jones commented on Wells' apparant Italian heritage. Wells mentioned that he had obtained the new job that he had mentioned during his previous office visit on January 10th. Dr. Jones wrote a prescription for thirty Quaalude tablets and gave the prescription to Wells; Wells again paid Dr. Jones ten dollars. Wells testified that he had not requested the prescription and that Dr. Jones did not make any inquiry into his medical history or make any kind of physical examination. Wells also told Dr. Jones that his wife had taken and benefited from some of the Quaalude tablets. Wells requested a prescription for his wife, but Dr. Jones refused, stating

3. On this occasion, officer Wells carried a concealed microphone that transmitted his conversation with Dr. Jones to a receiver-recorder operated by officer Wagner, who was stationed in an automobile outside. The Government introduced the taped record of the conversation into evidence. The recording was of poor quality and partly inaudible.

that she would have to come to the office for a prescription. Wells filled his prescription at King Pharmacy in St. Louis. These events formed the basis for count II of the indictment, on which the jury returned its guilty verdict.

In order to buttress its case against Dr. Jones, the prosecution introduced 478 prescriptions issued by Dr. Jones to patients over an approximate twenty-month period between August 9, 1975, and April 26, 1977. These prescriptions had been filled by Gross Drugs in St. Louis. An agent of the Drug Enforcement Agency also testified about prescriptions issued by Dr. Jones that had been filled at other St. Louis pharmacies. The agent indicated that in a three-month period from November 1976, through January 1977, Dr. Jones' prescriptions for Schedule II drugs accounted for forty-seven percent of Gross Drugs' total volume of Schedule II drug prescriptions.

An investigator for the Missouri Division of Health, Bureau of Narcotics, testified that he visited Dr. Jones in January of 1976 and warned Dr. Jones about prescribing large quantities of Schedule II drugs to certain types of people. The investigator declared that after their conversation Dr. Jones cancelled the rest of his appointments scheduled for that day.

The Government then called police officers associated with the Drug Enforcement Division of the St. Louis Police Department, who identified thirteen individuals named as patients on some of the 478

prescriptions written by Dr. Jones and filled at Gross Drugs. The police officers testified that all of these individuals have recognizable "track marks," which are scars or discolorations indicative of drug addiction, on their arms or hands, and that some were "slender." A pharmacist testified that in February of 1977 he had filled about a dozen prescriptions for Quaalude issued by Dr. Jones; he described the recipients as young people around twenty years of age.

The introduction of this evidence, over objection by the defendant Dr. Jones, placed Dr. Jones in a posture of having to explain not only a proper medical purpose for prescribing Quaalude for pseudo-patient officer Wells, but also his medical treatment for the thirteen individuals identified as probable drug addicts by police officers. In addition, Dr. Jones was required to attempt to rebut the suggestion of wrongful conduct in prescribing Schedule II narcotics for the scores of persons listed as patients in the 478 prescriptions seized by the prosecution and introduced in evidence. Indeed, the transcript of the trial establishes that most of the trial time, including examination and cross-examination of Dr. Jones, dwelt not on matters covered by the indictment but on Dr. Jones' conduct in issuing the 478 other prescriptions.

II. *Other Crimes Evidence.*

Appellant argues that the trial court committed prejudicial error in admitting into evidence testimony relating to the 478 other prescriptions issued by Dr.

Jones for Schedule II drugs and in permitting St. Louis police officers to identify several of the patients named in these prescriptions as known or recognizable drug addicts. The Government, citing *United States v. Calvert*, 523 F.2d 895 (8th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976), and Federal Rule of Evidence 404(b),[4] argues that evidence of other crimes or similar acts is admissible to show intent, knowledge, plan, or absence of mistake when those matters are at issue in the trial.

That Dr. Jones issued a great number of prescriptions for Schedule II drugs demonstrates familiarity, *i.e.*, knowledge, concerning the usages of Quaalude. But the Government clearly did not introduce that evidence for such limited and proper purpose. By obtaining testimony from various police officers that some of the patients named in prescriptions for Schedule II drugs were narcotics addicts, the prosecution sought to imply that some, if not all, of these 478 prescriptions had been issued by Dr. Jones outside the legitimate and proper scope of medical practice. The prosecution did not introduce any evidence concerning the doctor-patient relationship existing with respect to these prescriptions, nor did it present other proof that the

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4.
Fed. R. Evid. 404(b) reads:

> (b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

prescriptions had not been issued for a proper medical purpose.

In *United States v. Clemons*, 503 F.2d 486, 489 (8th Cir. 1974), we said that evidence of alleged other crimes must be "clear and convincing." That case arose prior to the adoption of the Federal Rules of Evidence, which became effective on July 1, 1975. Subsequent to the adoption of the Federal Rules, in *United States v. Maestas*, 554 F.2d 834, 837 n.2 (8th Cir. 1977), we commented that "evidence [of other crimes] which is vague and speculative is not competent proof and should not be admitted into evidence."

The other prescriptions of Schedule II drugs by Dr. Jones to his patients constituted crimes or unlawful acts similar to the crimes charged in the indictment only if Dr. Jones issued those prescriptions outside the bounds of professional medical practice. *United States v. Moore*, 423 U.S. 122, 124, 142 (1975). Absent any evidence bearing upon Dr. Jones' treatment of the patients in question, issuance of the prescriptions without more does not show that Dr. Jones acted unprofessionally in issuing these prescriptions. Therefore, the district court erred in admitting these prescriptions as evidence of other crimes, wrongs, or similar acts under Federal Rule of Evidence 404(b).

Moreover, the evidence, even though relevant for some purpose, should have been excluded under Federal Rule of Evidence 403, which reads as follows:

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The evidence in question was relevant in part to establish the nature of Dr. Jones' practice and his knowledge of restrictions on prescribing Quaalude as a sleeping tablet. However, the Government sought to imply wrongdoing on the physician's part from the quantity of the prescriptions and the "quality" of some patients. The evidence lacked substantial probative force upon the issue of improper medical practice in the transactions charged, yet it could have led the jury to speculate that the quantity of prescriptions alone established wrongful conduct by Dr. Jones.

The trial transcript indicates that the Government spent more time in its case-in-chief dealing with alleged wrongful conduct not covered by the indictment than it spent dealing with the incidents for which Dr. Jones was charged. When Dr. Jones took the witness stand to present his defense, he was required to respond to some 478 instances of allegedly improper practice in issuing medical prescriptions, matters not set forth in the indictment, and was subject to vigorous cross-examination relating to these

other claims of wrong-doing. This case calls for the application of the exclusionary principle of Rule 403, for the probative value of the evidence in question was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading of the jury.

III. *Motion for Acquittal.*

Appellant urges as error the district court's failure to sustain a motion for acquittal. We do not know the grounds on which the motion was based, for the motion is not included in the record on appeal. We have only these two statements from appellant's brief to guide us:

> The Court committed prejudicial error in failing to sustain Defendant's Motion for Judgment of Acquittal at the Close of All the Evidence for the Government and at the Close of All the Evidence in the case for the reason that there was no expert witness testimony that the prescriptions [sic] issued by defendant were not for a legitimate medical purpose and not issued in the usual course of professional practice.
>
> * * * *
>
> Lastly, it needs to be said that the evidence is insufficient to convict the defendant because Dr. Burton merely testified, and remember he was an associate professor of Pharmacology at Washington University Medical School only, that, ". . . we teach our

> medical students that they must take a proper history and complete history, and they must do a physical examination and then prescribe the appropriate drug for the diagnosis they arrive." And in answer to the question, "Do you feel in any prescribing situation a proper history and physical should be taken?" He answered, "Yes, sir."

Appellant appears to be arguing either that the Government failed to establish a medical standard for prescribing Quaalude or that the Government, though establishing a medical standard, failed to prove by the testimony of medical experts that Dr. Jones did not comply with the standard.

We reject both of these arguments. The testimony of Dr. Robert Burton, called by the prosecution, as well as that of Dr. Charles Jost, called by appellant, substantially agreed that a physician should inquire as to a patient's general condition before prescribing Quaalude or other Schedule II drugs. Dr. Burton testified that before prescribing any drug, a physician must take a medical history and make some physical examination. Witness Burton possesses a Ph.D. in pharmacology. Although not an M.D., his twenty years of teaching at the Washington University Medical School qualifies him as an expert entitled to express an opinion as to medical procedures in prescribing drugs such as those listed under Schedule II. Thus, the Government adequately proved a medical standard. The question of whether Dr. Jones' procedures met that standard was for the

jury to determine, not expert witnesses. *See United States v. Green*, 511 F.2d 1062, 1073 (7th Cir.), *cert. denied*, 423 U.S. 1031 (1975).

Thus, the trial judge did not err in denying the motion for acquittal on the narrow grounds asserted on appeal. Although our decision on appeal does not require a dismissal of the conviction on count II against Dr. Jones, from our review of the record, we believe that this court's comment in *United States v. Garvin*, 565 F.2d 519, 523 (8th Cir. 1977), apropos:

> We view the evidence of record in this case as extremely marginal. However, * * * we find nothing to preclude a re-trial if the Government chooses that course * * *.

Reversed and remanded.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX J

UNITED States v. McClintic, Jr.
No. 77-1174
(8th Cir. Jan. 13, 1978)

Before HEANEY and BRIGHT, Circuit Judges, and TALBOT SMITH,* Senior District Judge.

TALBOT SMITH, Senior District Judge.

The defendant appeals from a jury verdict of guilty on five counts of a six-count indictment. We affirm.

Count I charged the defendant, Scott Voeltz, and Robert Braumann with violating 18 U.S.C. §371 by conspiring to commit wire and mail fraud, and interstate transportation and receiving of stolen property, in violation of 18 U.S.C. §§ 1341, 1343, 2314, and 2315. Counts II, III, and V charged the defendant with receiving stolen property transported in interstate commerce in violation of 18 U.S.C. §§ 2 and 2315. Count IV charged the defendant with interstate transportation of stolen property in violation of 18 U.S.C. §§ 2 and 2314. The jury acquitted the defendant of the sixth count, which charged an extortionate

*TALBOT SMITH, Senior District Judge, Eastern District of Michigan, sitting by designation.

extension of credit in violation of 18 U.S.C. §892. The defendant was sentenced to five years imprisonment on count I and ten years on count II, to run concurrently. He was sentenced to ten years imprisonment on count III, to run consecutively to the terms on counts I and II. He received prison terms of ten years on each of counts IV and V, to run concurrently with counts I, II, and III.

After filing notice of appeal, defendant filed a motion for a new trial on the ground of newly discovered evidence. This Court remanded to the District Court[1] for disposition and defendant's motion was subsequently denied. On appeal, the defendant challenges the adequacy of the indictment, the trial court's refusal to sever counts I, II, and III from counts IV and V, several evidentiary rulings, and the denial of his new trial motion based on newly discovered evidence.

Counts I, II and III arise out of the defendant's involvement in the so-called Mount Vernon scheme. Pursuant to this scheme the defendant initially loaned money to Susan Dvorak. She in turn transferred part of the money to Scott Voeltz and Robert Braumann to operate a food concession in Florida. Unable to collect the loan from Ms. Dvorak, the defendant attempted to collect directly from Voeltz and Braumann, without success. Agreeing that they could pay in merchandise,

1. The Honorable Edward J. McManus, Chief United States District Judge for the Northern District of Iowa.

Voeltz and Braumann, with defendant's knowledge, operated two business fronts, Star Sales and Mount Vernon Sales, on premises in Mount Vernon, Iowa. Using false financial statements and alternating their "companies" as credit references, they placed orders by mail and telephone with a variety of wholesale suppliers. When the suppliers checked the "references" by telephone, the false information was confirmed. Quick Products, a local sales company owned by the defendant and his brother, was also used as a credit reference; false credit reference confirmations were provided through the cooperation of the defendant and Timothy Morrissey, a Quick Products employee.

When Voeltz and Braumann received merchandise in late May, 1975, the defendant took items valued at about $14,000 in repayment of the loan and sold them in his own name. Morrissey helped transfer the goods to the defendant's residence. When the initial sales of the merchandise did not satisfy the defendant, he returned to Voeltz, who furnished him with more merchandise later in June, 1975.

Counts IV and V arise out of the defendant's involvement in the so-called "Paper Place" scheme in Denver, Colorado. In August or early September, 1975, Morrissey approached the defendant with an outline for a novel which Morrissey had entitled "Paper Place." The outline detailed a check-kiting scheme in which persons would set up a bogus company and open

bank accounts using false documents and identification. Payroll checks written on the accounts would be cashed in supermarkets and retail stores on a weekend, while the banks were closed; the rest of the scheme would be closed up by the end of the weekend. After discussion of the scheme, the defendant loaned money to Morrissey to try the plan out in Minnesota. This attempt, and another, executed in Salt Lake City and similarly financed by a loan from defendant, were economically unsuccessful.

Anxious to pay back his loans, Morrissey met with defendant later in September and discussed a trip to execute the Paper Place scheme in Denver. Defendant again loaned money to Morrissey to finance the trip. The operation of the Denver scheme was successful, netting several thousand dollars worth of merchandise, which Morrissey and an accomplice brought back to Iowa for resale.

Morrissey and his accomplice removed some of the serial numbers from the goods and shortly thereafter, the defendant and Morrissey began to sell the merchandise locally, for cash. They were unsuccessful in recouping the amount of the loans outstanding to Morrissey, so a few weeks later, the Paper Place scheme was attempted in Rockford, Illinois, at defendant's suggestion. After two or three days in Rockford, the sham was detected, and Morrissey and his accomplice were arrested. Defendant McClintic was apprehended later.

I.

Defendant contends that the trial court erred by refusing to dismiss counts II, III, and V of the indictment as fatally defective for failing to charge a violation of 18 U.S.C. §2315.[2] Defendant complains that by charging him with receipt of stolen merchandise which he knew "to have been stolen, unlawfully converted and taken by *fraud*," (emphasis supplied), counts II, III, and V added an element not contained in the statute. The defendant argues that the addition of this descriptive element had the effect of charging acts which are not proscribed by 18 U.S.C § 2315.

The defendant's argument is defective in three particulars. First, the addition of the descriptive element did not mislead the accused; rather it merely described in greater detail "the elements of the offense charged and fairly inform[ed] [him] of the charge

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2.
18 U.S.C. §2315 provides in relevant part:

> Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, *knowing the same to have been stolen, unlawfully converted, or taken;*
>
> * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both. (Emphasis supplied.)

against which he must defend." *Hamling v. United States*, 418 U.S. 87, 117 (1974).

Second, the accepted construction of the term "stolen," as used in the present codification of the National Stolen Property Act, 18 U.S.C. §§ 2314 and 2315, as well as the "Dyer Act,"[3] includes "all felonious takings . . . with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." *United States v. Turley*, 352 U.S. 407, 417 (1957). *See also United States v. Frakes*, 563 F.2d 803, 805 (6th Cir. 1977); *United States v. McClain*, 545 F.2d 988, 995 (1977); *Lyda v. United States*, 279 F.2d 461, 464 (5th Cir. 1960); *Bergman v. United States*, 253 F.2d 933, 935 (6th Cir. 1958). A taking "by fraud," fits accurately within the expansive definition of "stolen" above.

Third, the legislative history of 18 U.S.C. §2315 shows that the type of taking referred to in the scienter clause was a *taking by fraud.* Section 4 of the National Stolen Property Act, ch. 333, 48 Stat. 795 (1934), the precursor to 18 U.S.C. §2315, provided originally as follows:

> Whoever shall receive, conceal, store, barter, sell, or dispose of any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more, or whoever shall pledge or accept as security for a loan any goods, wares, or merchandise, or securities of the value of $500 or more which, while moving in or constituting a part of interstate or foreign commerce, *has been stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been stolen or taken,* shall be punished by a fine of not more than $10,000 or by imprisonment of not more than ten years, or both. (Emphasis supplied.)

3. The Dyer Act, 18 U.S.C. §2312, prohibits the interstate transportation of "stolen" vehicles.

Subsequent simplifying amendments of this language in later codifications reveal no hint that Congress thereby intended to restrict the statute's reach. We agree with the Fifth Circuit in *Lyda v. United States, supra,* that the class of deprivations of property which Congress sought to prohibit in the National Stolen Property Act includes "a forcible taking or a taking without . . . permission, by false pretense, by fraud, by swindling, or by a conversion by one rightfully in possession." 279 F.2d at 464. The indictment accurately spelled out the elements of the offense charged.

II.

The defendant claims that the trial court erred by refusing to sever counts I, II, and III, relating to the Mount Vernon scheme, from counts IV and V, relating to the Paper Place scheme. He argues that the Mount Vernon and Paper Place schemes were dissimilar in character and that the jury was prejudicially swayed by the accumulated evidence against him.

Fed. R. Crim. P. 8(a) permits joinder of offenses if "the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Rule 14 permits severance to avoid undue prejudice. Where the offenses are similar in character and occurred over a relatively short period of time and the evidence overlaps, joinder is ordinarily appropriate. *United States v. Riley*, 530 F.2d 767, 770 (8th Cir. 1976), *United States v. Hoog*, 504 F.2d 45, 49 (8th Cir. 1974), *cert. denied*, 420 U.S. 961 (1975). The trial court has a wide range of discretion in matters of severance, and we reverse only upon a finding of clear prejudice and abuse of discretion. *United States v. Lewis*, 547 F.2d 1030, 1033 (8th Cir. 1976), cert. denied, 429 U.S. 1111 (1977). *United States v. Riley, supra; United States v. Chrisco*, 493 F.2d 232, 239 (8th Cir. 1974), *cert. denied*, 419 U.S. 847 (1974); *United States v. Simon*, 453 F.2d 111, 114 (8th Cir. 1971). Here, the defendant participated in each scheme in a nearly identical manner: - that is, by receipt and sale of fraudulently obtained merchandise as payment on a previous loan. While Voeltz and Braumann did not participate in the second scheme, McClintic's involvement in both smoothly shifted from sales of the Mount Vernon goods to financing the Paper Place operations. No abuse of discretion has been shown. Defendant's contention that joinder allowed the jury to impermissably pool incriminating evidence against him is belied by his acquittal of count VI.

III.

Timothy Morrissey was the principal government witness concerning the Paper Place scheme. He testified that although he and McClintic had discussed the scheme prior to his Denver trip, he did not explain to the defendant after the trip how the goods had been obtained. The government then elicited over the defendant's objection Morrissey's opinion that McClintic knew that the Denver merchandise had been fraudulently obtained. Defendant now claims that this testimony went beyond the proper bonds for a lay witness' opinion and could not have been rationally based on the perceptions of the witness.

Rule 701 of the Federal Rules of Evidence limits the opinions of a lay witness to "those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." Defendant does not contest that the opinion of the person closest to McClintic during the planning of the Denver scheme and its aftermath would be helpful in determining whether or not the defendant knew that the goods were obtained by fraud. Rather, defendant disputes the basis for the witness' opinion.

Here the basis seems ample. In the first place there had been a full discussion between defendant and Morrissey of the details of operation of the Paper

Place scheme, which was employed in Denver. Moreover, defendant's actions in negotiating cash sales of the fraudulently obtained goods soon after Morrissey returned from Denver were fully consistent with the implementation of the theretofore discussed scheme. Morrissey's opinion that the defendant fully understood how the goods had been obtained was rationally based upon his perceptions, and his opinion was proper as "a shorthand rendition of [the witness'] knowledge of the total situation and the collective facts." *United States v. Freeman*, 514 F.2d 1184, 1191 (10th Cir. 1975). The trial court did not abuse its discretion by permitting this testimony.

IV.

The defendant, testifying in his own behalf, asserted that the first time in his life when he had done anything illegal was when he participated in organizing the Paper Place scheme in Rockford, Illinois. On cross-examination, however, the prosecutor inquired into the defendant's atempt in 1973 to sell a two-hundred dollar ring for $8,000. The buyer had been in reality an FBI agent, and the attempted swindle had resulted in a charge in the

defendant's then-current terms of probation.[4] The trial court ruled, over objection, that this inquiry was proper cross-examination. Defendant argues that it unfairly prejudiced him by presenting prior criminal acts which bore no relation to the issues at trial. We disagree.

Inquiry into the defendant's prior act of misconduct is justified on two grounds. First, McClintic's attempt to swindle the ring buyer was an act of deception that reflected upon his character for truthfulness and as such, was properly subject to inquiry during cross-examination under Fed. R. Evid.

4.
The defendant had testified on direct examination that in 1972 he had been indicted for his involvement in an alleged scheme to defraud a vending machine company. Those charges were resolved by a plea bargain: defendant pled guilty to three counts of mail fraud in exchange for a sentence of three years on probation and dismissal of 30 other counts of the indictment.

During defendant's cross-examination, only the true identity of the ring buyer was revealed to the jury; the effect of the incident on the defendant's probation was not.

608 (b).[5] *United States v. Brown*, 547 F.2d 438 (8th Cir. 1977), *cert. denied sub nom., Hendrix v. United States*, 430 U.S. 937 (1977). Admissibility of prior misconduct which is probative of a witness' truthfulness is expressly entrusted to the trial court's discretion by Rule 608(b). This incident was not remote in time from the trial,[6] its nature made it probative of the defendant's untruthfulness, and the prejudicial aspects of its effect on the defendant's probationary status were not exposed to the jury. We cannot say that the danger of unfair prejudice, confusion of issues or misleading the jury so substantially outweighed the

---

5.
Fed. R. Evid. 608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
>
> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

6.
An incident's remoteness in time is no longer an explicit factor under Rule 608(b). *See*, H.R. Rep. 93-650, 93d Cong., 1st Sess; *United States v. Burch*, 490 F.2d 1300, 1302 n. 1 (8th Cir. 1974), *cert. denied*, 416 U.S. 990 (1974). Nevertheless, remoteness in time remains a consideration relevant to the evidence's probative value.

evidence's probative value that its admission was an abuse of discretion under Fed. R. Evid. 403.[7]

Moreover, the ring-swindle cross-examination was proper as impeachment by contradiction. C. McCormic, *McCormick on Evidence* § 47 at 97 (2d ed. 1972). By painting a picture of himself as an innocent who succumbed to sympathy for Morrissey in the Rockford, Illinois scheme, the defendant invited cross-examination concerning this previous misconduct.[8]

We find no abuse of discretion in the rulings made.

V.

Finally we consider the motion for a new trial. Defendant's co-conspirators Voeltz and Braumann were the government's principal witnesses in the Mount Vernon scheme. Both had struck plea bargains before testifying but not all of the terms had been reduced to writing in the government's memoranda during cross-examination but they were not admitted

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7.
See, Advisory Committee's note to Proposed Rule 608, Subdivision (b).

8.
United States v. Glasser, 443 F.2d 994, 1002 (2d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971); *United States v. Reddington*, 433 F.2d 997, 998 (4th Cir. 1970). *See also United States v. Batts*, 558 F.2d 513 (9th Cir. 1977) (allow-extrinsic evidence to contradict the defendant's assertion that he was naive in drug matters).

as exhibits on the ground that they were merely cumulative. After defendant's conviction the terms of the bargain made were the subject of lengthy controversy, as well as evidentiary hearings, and based upon the evidence there developed, a motion for new trial on the grounds of newly discovered evidence was made. The denial of this motion is asserted as error.

The version of the bargain that had gone before the jury was that, in return for the testimony of Voeltz and Braumann, the government would recommend probation as to Braumann and "recommend and bind itself" to probation for Voeltz.[9] But it finally developed, from the evidentiary hearings, and it was conceded by the government, that the bargain actually made involved the unusual commitment by the

9.
On direct examination the following testimony was elicited by prosecutor Robert Sikma from codefendants Braumann and Voeltz:

BRAUMANN

Q. What is that agreement, the best of your understanding?

A. If I cooperate and plead guilty to one count and the Government recommends probation.

Voeltz

Q. You have been also told that the Government will agree to recommend and bind itself to a sentence of probation in this case. Is that correct?

A. That is correct.

government that if the Court did not acquiesce in probation all charges would be dismissed.[10]

Initially Braumann was put on probation but probation was refused as to Voeltz. After a series of legal maneuvers which we need not recite, the case was transferred to Judge Hanson and Voeltz eventually received probation.[11] Thus each codefendant has received the benefit of his bargain.

The issue argued by defendant is a narrow one, namely that the defendant is entitled to a new trial on the ground that the lenient term of the plea agreement, relating to dismissal of the charges, was placed before neither the court nor jury, and that the trial court erred in denying the motion for new trial. The government, per contra, urges that the jury was well aware that, because of their plea bargains, the codefendants were not to suffer incarceration, and whether their freedom resulted from grant of probation or dismissal of charges the end result was the same, namely, that under no circumstance would either codefendant "serve time."

There is no doubt that the essential terms of a plea bargain, once reached, must be honored by the

10.
This was specifically applicable to Voeltz (T. p. 10, Hearing on Government's Motion to Dismiss Indictment) and, according to Braumann's counsel, (T. pp. 20 and 21, Hearing on Plea and Sentencing) also to him.

11.
So we were informed, and without denial, upon oral argument.

prosecution, *Santobello v. New York*, 404 U.S. 257, 262 (1971).

Rudimentary demands of a fair trial also require that the terms of a plea bargain reached with a material prosecution witness be disclosed to the judge and jury so that the trier of fact may weigh the witness' credibility. *United States v. Pope*, 529 F.2d 112, 114 (9th Cir. 1976). While this doctrine arose from a series of cases in which witnesses were allowed to prejure themselves as to agreements made, either through inadvertence or design,[12] it also encompasses situations in which the government allows materially misleading statements to go uncorrected. *United States v. Harris*, 498 F.2d 1164, 1169 (3d Cir. 1974), *cert. denied*, 419 U.S. 1069 (1974).[13] In this case, the

12.

Giglio v. United States, 405 U.S. 150 (1972) extended *Napue v. Illinois*, 360 U.S. 264 (1959) to nondisclosures, "whether the . . . the result of negligence or design." *Giglio v. United States*, at 154. *See also United States v. Sutton*, 542 F. 2d 1239, 1241 (4th Cir. 1976); *Boone v. Paderick*, 541 F.2d 447, 450-51 (4th Cir. 1976), *cert. denied*, 430 U.S. 959 (1977).

13.

> We do not believe, however, that the prosecution's duty to disclose false testimony by one of its witnesses is to be narrowly and technically limited to those situations where the prosecutor knows that the witness is guilty of the crime of perjury. Regardless of the lack of intent to lie on the part of the witness, *Giglio* and *Napue* require that the prosecutor apprise the court when he knows that his witness is giving testimony that is substantially misleading. This is not to say that the prosecutor must play the role of defense counsel, and ferret out ambiguities in his witness' responses on cross-examination. However, when it should be obvious to the Government that the witness' answer, although made in good faith, is untrue, the Government's obligation to correct that statement is as compelling as it is in a situation where the Government knows that the witness is intentionally committing perjury.
>
> *United States v. Harris*, 498 F.2d 1164, 1169 (3d Cir. 1974).

government inexcusably neglected to correct the misleading impression made by the memoranda of negotiated pleas and to fully and accurately disclose the true nature of the plea bargain.

But in order to justify a new trial we must weigh the reasonable impact of the omitted evidence on the jury verdict. As the Supreme Court held in *Giglio v. United States*, 405 U.S. 150, 154 (1972):[14]

> We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. . . . " *United States v. Keogh*, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under *Brady, supra*, at 87.[15] A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . ." *Napue, supra*, at 271.[16] (Footnotes ours.)

14.

The *Giglio* standard has been recently reconfirmed by the Supreme Court in *United States v. Agurs*, 427 U.S. 97, 103 (1976) as it has been applied to conduct which may have corrupted the truth-finding process. *See United States v. Sutton*, 542 F.2d 1239, 1241 (4th Cir. 1976).

15.

Brady v. Maryland, 373 U.S. 83 (1963).

16.

Napue v. Illinois, 360 U.S. 264 (1959).

Here the proviso not brought to the attention of court and jury[17] could not, in any reasonable likelihood, have affected the judgment of the jury. It was made clear to the jury that neither Voeltz nor Braumann would suffer incarceration as a result of their bargain.[18] The fact that their freedom would result from a grant of probation rather than a dismissal of the charges might have a legal significance as to some situations but it would not, in our judgment, and that of the trial court, be so additionally persuasive to a jury on the issue of credibility, and thus ultimately on the issue of defendant's guilt or innocence, that a new trial should result. We find no error in the court's denial of the motion for new trial.

The judgment of the trial court is affirmed.

A true copy
ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

17.
The situation arose, according to the prosecutor, by reason of a clerical mishap in his office. A careful examination of all references in the transcripts to the plea bargain discloses no hint of bad faith. The final arguments were not reported; hence we have been unable to make an examination thereof. But no significant charges with respect thereto are presented by the appellant.

18.
In this case, it is not claimed that the prosecutor exacerbated the situation by improper and misleading argument. *Cf., United States v. Gerard*, 491 F.2d 1300 (9th Cir. 1974); *Boone v. Paderick*, 541 F.2d 447 (4th Cir. 1976), *cert. denied*, 430 U.S. 959 (1977).

APPENDIX K

Regulations of Lonoke Production Credit Association (g) and (h)

. . . No salaried officer, agent . . . "(g) Shall participate, directly or indirectly, in any transaction concerning the purchase or sale of corporate stocks or bonds, commodities, or other property for speculative purposes if such action might tend to interfere with the proper and impartial performance of his duties or bring discredit upon any Farm Credit institution. *Employees are not prohibited by this paragraph from making bona fide investments. When an employee is uncertain as to whether a contemplated transaction would constitute a conflict of interest, he should consult his immediate supervisor;*

"(h) Shall have business relations, directly or indirectly, involving activities with borrowers which permits or gives the appearance of permitting undue influence, such as the purchase or sale of commodities or supplies, the placement of insurance, sale of real estate, auctioneering, sales barns, or appraisal service, except in his official capacity, as an employee of the Farm Credit institution; provided that *this prohibition shall not be applicable to any employee who was engaged in such activity on May 1, 1972, until December 31, 1973,* and thereafter shall not be applicable to any such employee exempt therefrom upon the recommendation of the bank board and approval of the Governor, taking into account his contribution to the System and alternatives available." (Emphasis added)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT 6 TO THE UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy...the right to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him...

AMENDMENT 5 TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;... nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;...

18 USCA §1006. Federal credit institution entries, reports and transactions.—Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, National Credit Union Administration, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary

of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank of cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, or by the Administrator of the National Credit Union Administration, or any small business investment company, with intent to defraud any such institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States makes any false entry in any book, report or statement of or to any such institution, or without being duly authorized, draws any order or bill of exchange, makes any acceptance, or issues, puts forth or assigns any note, debenture, bond or other obligation, or draft, bill of exchange, mortgage, judgment, or decree, or with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both. (June 25, 1948, c. 645, §1, 62 Stat. 750; May 24, 1949, c. 139, §20, 63 Stat. 92; July 28, 1956, c. 773, §2, 70 Stat. 714; Aug. 21, 1358, P. L. 85-699, Title VII, §704, 72 Stat. 698; Oct. 4, 1961, P. L. 87-353, §3(s),

75 Stat. 774; May 25, 1967, P. L. 90-19, §24(a), 81 Stat. 27.) Act Oct. 19, 1970 P. L. 91-468 §6, 84 Stat. 10.

18 USC §1014. Loan and credit applications generally—Renewals and discounts—Crop insurance.—Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security for the purpose of influenceing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or any corporation organized under sections 1131-1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a joint-stock land bank, a Federal land bank association, a Federal Reseve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration upon any

application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years or both (June 25, 1948, c. 645, §1, 62 Stat. 752; May 24, 1949, c. 139, §21, 63 Stat. 92; July 26, 1956, c. 741, Title I, §109, 70 Stat. 667; Aug. 21, 1958, P. L. 85-699, Title VII, §705, 72 Stat. 699; Oct. 4, 1961, P. L. 87-353, §3(t), 75 Stat. 774; July 2, 1964, P. L. 88-353, §5, 78 Stat. 269; Oct. 19, 1970, P. L. 91-468, §7, 84 Stat. 1017; Dec. 31, 1970, P. L. 91-609, Title IX, §915, 84 Stat. 1815.)

Explanatory note.—Provisions for the establishment of National Agricultural Credit Corporations were repealed by Acts Sept. 8, 1959, P. L. 86-230, §24, 73 Stat. 466, and Sept. 9, 1959, P. L. 86-251, §1 (c) (1), 73 Stat. 488.

18 USC §371. Conspiracy to commit offense or to defraud United States.—If two or more persons conspire either to commit any offense aganst the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only,

the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (June 25, 1948, c. 645, §1, 62 Stat. 701.)

18 USC §2. Principals.—

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. (June 25, 1948, c. 645, §1, 62 Stat. 684; Oct. 31, 1951, c. 655, §17b, 65 Stat. 717.)

T. 18 USC §657. Lending, credit and insurance institutions.—Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, National Credit Union Administration, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which

are insured by the Federal Savings and Loan Insurance Corporation or by the Administrator of the National Credit Union Administration, or any small business investment company, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both. (June 25, 1948, c. 645, §1, 62 Stat. 729; May 24, 1949, c. 139, §11, 63 Stat. 90; July 28, 1956, c. 773, §1, 70 Stat. 714; Aug. 21, 1958, P. L. 85-699, Title VII, §703, 72 Stat. 698; Oct. 4, 1961, P. L. 87-353, §3(q), 75 Stat. 774; May 25, 1967, P. L. 90-19, §24(a), 81 Stat. 27 Act Oct. 19, 1970, P. L. 91-468, §4, 84 Stat. 1016.)

Nos. 78-328 and 78-333

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOE HENRY CHAMBERS, PETITIONER

v.

UNITED STATES OF AMERICA

CHARLES THOMAS GRIFFIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 13-31)[1] is reported at 579 F. 2d 1104.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1978. Petitions for rehearing were denied on July

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[1]All appendix references are to the appendix filed by petitioner Chambers (No. 78-328).

28, 1978 (Pet. App. 32-33). The petitions for a writ of certiorari were filed on August 25, 1978 (No. 78-328) and August 28, 1978 (No. 78-333). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government's use at trial of co-conspirators' false exculpatory statements denied petitioners either the right of confrontation or a fair trial.

2. Whether Counts II and III of the indictment sufficiently informed petitioners of the charges against them.

3. Whether evidence of prior similar acts was properly admitted.

4. Whether evidence of petitioners' attempt to cover up their fraud was properly admitted.

5. Whether there was sufficient evidence in the record to support petitioner Griffin's conviction on Count V.

6. Whether the trial court properly instructed the jury on the elements of a fraudulent receipt as set forth in 18 U.S.C. 1006.

7. Whether petitioners were improperly denied access to allegedly exculpatory material.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Arkansas, both petitioners were convicted, together with co-defendant Bill Hansell, of conspiring to defraud and actually defrauding a federally-chartered loan association, in violation of 18 U.S.C. 371 and 1006. Petitioners Griffin and Hansell were also convicted of preparing a false loan application for the purpose of influencing the actions of a loan association, in

violation of 18 U.S.C. 1014 and 2.[2] Petitioner Griffin received concurrent terms of 15 months' imprisonment on each of the three counts on which he was convicted and was fined a total of $20,000. Petitioner Chambers also received concurrent terms of 15 months' imprisonment on each of the two counts on which he was convicted and was fined a total of $7,500. The court of appeals affirmed (Pet. App. 13-31).

The evidence showed that Griffin, Chambers, and Hansell, who were, respectively, president, vice-president, and a branch manager of the Lonoke Production Credit Association (LPCA),[3] conspired to defraud the association by making unlawful profits in connection with an LPCA loan transaction. Specifically, petitioners conditioned an LPCA loan on the borrower's purchase of petitioners' land at a substantially inflated price.[4] Concomitantly, petitioners fraudulently arranged a second LPCA loan to cover the purchase price of the land.

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[2]Count I charged all three defendants with conspiracy to fraudulently receive funds of a federally-insured loan association, in violation of 18 U.S.C. 371 and 1006. Count II charged only petitioner Griffin, Count III charged only petitioner Chambers, and Count IV charged only co-defendant Hansell with defrauding a federally-insured loan association, in violation of 18 U.S.C. 1006. Count V charged all three defendants with preparing a false loan application, in violation of 18 U.S.C. 1014 and 2. The jury found defendants guilty of all counts, except that it acquitted Chambers on Count V. Hansell did not join in petitioners' appeal to the Eighth Circuit.

[3]The LPCA is a farmer-owned and controlled loan association organized under the Farm Credit System and designed to provide short and intermediate term credit to farmers in the association's federally chartered "territory"—four centrally located Arkansas counties (Pet. App. 16; 1 Tr. 60, 63-64). The LPCA is supervised by the Federal Intermediate Credit Bank of St. Louis, Missouri, whose approval is required for lending money for use outside the association's territory or to an individual borrower beyond the association's "excess loan limit" (1 Tr. 59-60, 109, 119).

[4]The land was purchased by petitioners but held in the name of O.M. Young, Trustee (Pet. App. 17).

Petitioners' conspiracy began in early 1974 when Hansell informed Harold Huntsman, a large farm operator, that his previous application for loans from the LPCA had been denied because the Federal Intermediate Credit Bank in St. Louis had objected to Huntsman's insufficient land holding in LPCA "territory" (II Tr. 173-178). Pursuant to Hansell's instructions, Huntsman began purchasing additional property within LPCA territory in order to obtain LPCA financing, but he again was unable to secure a crop loan for the 1974 season (II Tr. 174-179, 184-188). Subsequently, in July 1974, Hansell approached Huntsman and guaranteed him that the necessary funding would be forthcoming from LPCA if Huntsman would purchase a 2,880-acre cattle farm currently for sale, albeit outside the LPCA territory (II Tr. 185-198; III Tr. 140-142; IV Tr. 61-62, 63-64). Hansell, who told Huntsman that "Mr. Griffin was waiting for [his] decision" (II Tr. 193), additionally promised that Huntsman would lose no money on this deal and that an LPCA "crop loan" would be arranged to cover the purchase price (II Tr. 193-196, 202; IV Tr. 64-65).[5] Unbeknownst to Huntsman, this 2,880-acre farm had recently been purchased by petitioners from Irving Brauer through a trustee for $470,000 (Pet. App. 17-18; II Tr. 123-128, 198; IV Tr. 68).

Ultimately, Huntsman and his family agreed to buy the farm for $634,000, at which time Hansell prepared an LPCA crop loan application for $513,800, which purported to cover crops to be grown on the 2,880-acre cattle farm (Pet. App. 17-18; II Tr. 193-201). Subsequently, this loan application was approved by the Association Loan Committee (including petitioner Griffin) (I Tr. 104-105), and on July 24, 1974, after Huntsman had signed a contract purchasing the farm from O.M. Young, Trustee,

[5]A crop loan is used to finance the planting and harvesting of a crop and is repaid out of the proceeds of the sale of the crop (I Tr. 114-115; II Tr. 47-48, 93).

and assuming various debts in connection therewith (II Tr. 197-201), Huntsman received two checks constituting the proceeds of the crop loan. One check was issued in the amount of $121,433.33 made payable to Huntsman and the Bank of McCrory in order to obtain a release of an existing crop lien (I Tr. 110-112; II Tr. 64-65; Pet. App. 18). Hansell refused to give Huntsman the second check, which was issued in the amount of $386,600,[6] until Huntsman arranged to give Hansell a cashier's check for $292,319.18, made out to O.M. Young, Trustee, as down payment on the 2,880-acre farm (Pet. App. 18; II Tr. 196, 202-207; IV Tr. 166-169). Two days later, the trustee paid over $71,000 each to Griffin and Hansell, and $20,000 to Chambers (Pet. App. 18; IV Tr. 189-190).[7]

Petitioners' scheme began unraveling in December 1974 when Brauer, the previous owner of the farm, discovered that Huntsman was the current owner of the farm and contacted Huntsman over a past due payment (II Tr. 133-135; III Tr. 32). Huntsman had neither the money nor the inclination to meet this installment of the sales contract and told Brauer to contact Hansell at the LPCA for payment (II Tr. 133; III Tr. 32-35). Thereafter, Huntsman learned of the large difference between Brauer's selling price and his own purchase price (II Tr. 133-135; III Tr. 35-36), and apparently by March 1975 Huntsman also knew that petitioners had been the equitable owners of the 2,880-acre farm (Pet. App. 19).

[6]The difference between the total of the two checks ($508,033.33) and the loan amount ($513,800) was attributable to fees and insurance premiums (I Tr. 112-113).

[7]Huntsman's purchase price of $634,000 was $164,000 more than the price paid by petitioners to the prior owner Irving Brauer. A total of $162,000 was divided among the co-defendants as described above, and $2,000 was retained by Young, who died in 1976 (IV Tr. 185-186, 189-190).

At this time, Hansell approached Huntsman in order to cover up the fraud. Hansell admitted that the LPCA officers had unlawfully made a profit on the loan transaction and told Huntsman that he (Hansell) would do anything if Huntsman would not go to the FBI (Pet. App. 19; III Tr. 48-51; IV Tr. 139-146). Later that day, Jimmie Boggess, a friend of petitioners, called Huntsman and eventually arranged to buy the farm from Huntsman for $662,000 (Pet. App. 19; III Tr. 52-60; IV Tr. 67-70). This sale was consummated in Young's office with petitioner Chambers, Young, Boggess, and Huntsman present (Pet. App. 20; III Tr. 63-65). Petitioners and Hansell supplied the purchase money and subsequently induced Boggess to give a false statement to the government investigators concerning the circumstances of the purchase (Pet. App. 20; VI Tr. 46-61).

ARGUMENT

1. Petitioners raise several questions (Chambers Pet. 11-19; Griffin Pet. 14-17) concerning the use at trial of the co-defendants' written and signed statements given to government investigators regarding the Huntsman loan-sale transactions. These parallel statements, which were redacted to delete any reference to a co-defendant before being admitted into evidence, essentially told the same false exculpatory story (Pet. App. 21; V Tr. 131-188; Gov't Exhs. 63, 64, 65, 66, 67, 68). Thus, each defendant[x] claimed that Boggess had found a farm for sale and had invited him to participate in the speculative venture, which invitation was accepted. Thereafter, according to the defendants' story, each defendant received his proportionate share of the profits when Boggess and trustee Young arranged for the sale to Huntsman. Each

[x]Boggess gave the same story to investigators, and his statement in unredacted form was admitted into evidence during Boggess' direct testimony on behalf of the government (VI Tr. 37-58; Gov't Exh. 69).

defendant disclaimed more than a cursory knowledge of the specifics of the Huntsman loan and denied that the loan had any connection to the sale of property. At trial, Boggess and Hansell took the witness stand and admitted that their statements were false, and Boggess testified that the three defendants had supplied him with the false exculpatory story subsequently given to the government investigators (VI Tr. 38-62; VIII Tr. 21, 144-145, 156-157).

a. Petitioners contend (Chambers Pet. 11-14; Griffin Pet. 14-16) that this Court's opinion in *Bruton* v. *United States*, 391 U.S. 123 (1968), mandates a new trial here. However, *Bruton* involved the admission of a defendant's confession that "powerfully" and "devastating[ly]" incriminated his co-defendant, who was also on trial. *Id.* at 135-136. Since the defendant whose confession was admitted did not testify, this Court held that the co-defendant's rights under the Confrontation Clause of the Sixth Amendment had been violated. *Id.* at 128. In contrast, the statements admitted here were exculpatory in nature, see *United States* v. *Wingate*, 520 F. 2d 309, 313-314 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976); *United States* v. *Burke*, 495 F. 2d 1226, 1232-1233 (5th Cir. 1974); *United States ex rel. Nelson* v. *Follette*, 430 F. 2d 1055 (2d Cir. 1970), and, moreover, were redacted to delete any reference to a co-defendant, thereby avoiding the *Bruton* problem. See *Bruton* v. *United States*, *supra*, 391 U.S. at 133-134 n.10; accord, *e.g.*, *United States* v. *Dady*, 536 F. 2d 675 (6th Cir. 1976); *United States* v. *Alvarez*, 519 F. 2d 1052 (3d Cir.), cert. denied, 423 U.S. 914 (1975); *United States* v. *Trudo*, 449 F. 2d 649 (2d Cir.), cert. denied, 405 U.S. 926 (1972).

Furthermore, petitioners cannot demonstrate any cognizable prejudice from the admission of their statements. Boggess and Hansell testified at trial, which rendered their complete statements fully admissible. *Nelson* v. *O'Neil*, 402 U.S. 622 (1971); *United States* v. *Smith*, 451 F. 2d 595 (9th Cir. 1971); *United States* v. *Sims*, 430 F. 2d 1089 (6th Cir. 1970). Those statements tracked and interlocked with Chambers' and Griffin's false accounts, which were at least admissible against their respective makers. Thus, the only prejudice possibly suffered by Chambers stems from the spillover effect of Griffin's exculpatory statement, the substance of which had already been properly admitted against Chambers in the form of three other statements including his own. Similarly, of course, Griffin's alleged prejudice emanates from the insignificant cumulative effect of Chambers' exculpatory statement. In such circumstances, petitioners' Sixth Amendment claim is without merit.[9] *Mack* v. *Maggio*, 538 F. 2d 1129 (5th Cir. 1976); *United States* v. *Shaw*, 518 F. 2d 1182 (4th Cir. 1975); *United States ex rel. Stanbridge* v. *Zelker*, 514 F. 2d 45 (2d Cir.), cert. denied, 423 U.S. 872 (1975); *United States* v. *Spinks*, 470 F. 2d 64 (7th Cir.), cert. denied, 409 U.S. 1011 (1972); *United States ex rel. Duff* v. *Zelker*, 452 F. 2d 1009 (2d Cir. 1971), cert. denied, 406 U.S. 932 (1972).

[9]Nor is there any merit to petitioners' contention (Chambers Pet. 17-18; Griffin Pet. 16) that the district court erred in failing to charge the jurors concerning the limited admissibility of the redacted statements. The co-defendants' statements were read to the jury in rapid succession (V Tr. 159-187). After the first statement was admitted, the judge correctly instructed the jury that such a statement was "received only as to the defendant whose statement it is" (V Tr. 164). Petitioners did not request that this warning, which was applicable to all three statements, be repeated when their statements were introduced into evidence moments later. Moreover, the court had previously given a similar instruction and subsequently reiterated this admonition in its charge to the jury (II Tr. 181-184; XI Tr. 20).

b. Petitioner Chambers contends (Pet. 12-13) that the prosecutor committed prejudicial error in his opening statement by summarizing portions of the co-defendants' unredacted statements (Opening Tr. 22-30). However, as the court of appeals noted (Pet. App. 20-21), petitioners never objected to the prosecutor's opening argument or moved for a mistrial, and they are thus deemed to have waived their objection. *United States* v. *DeRosa*, 548 F. 2d 464, 471-472 (3d Cir. 1977); *United States* v. *Lawson*, 483 F. 2d 535, 538 (8th Cir. 1973), cert. denied, 414 U.S. 1133 (1974). In any event, this alleged error was harmless beyond a reasonable doubt. As already stated, the unredacted statements of Boggess and Hansell were admissible, and Chambers' own statement was admissible against himself. Griffin's statement was not admissible against Chambers, but Griffin's own counsel "in opening statement admitted nearly all of the facts referred to in Griffin's statement" (Pet. App. 21; see Opening Tr. 40-44). Given the cumulative, interlocking and exculpatory nature of the statements, the strength of the prosecution's case, and the trial court's curative charge,[10] the prosecutor's remarks do not constitute plain error. See *Brown* v. *United States*, 411 U.S. 223-230-232 (1973); *Schneble* v. *Florida*, 405 U.S. 427 (1972).

c. Petitioners next argue (Chambers Pet. 14-17; Griffin Pet. 16-17) that the defendants' written statements were not made in futherance of the conspiracy and are therefore inadmissible hearsay. However, Fed. R. Evid. 801(d)(2)(A) provides that "[a] statement is not hearsay * * * offered against a party and is * * * his own statement." Since the defendants' own statements were admitted solely against the respective declarant (V Tr. 164; XI Tr. 20), petitioners' claim is unavailing. See, *e.g.*, *United States* v. *Matlock*, 415 U.S. 164, 172 & n.8 (1974).

[10]The court instructed the jurors to consider only the evidence adduced at trial and not the lawyers' statements (XI Tr. 3-4, 6).

2. Petitioners further contend (Chambers Pet. 19-24; Griffin Pet. 7-9) that neither Count II (Griffin) nor Count III (Chambers) sufficiently charged a violation of 18 U.S.C. 1006. However, those counts (Pet. App. 7-8) fairly informed petitioners of the charges against them by concisely alleging the elements of the crime and the pertinent underlying facts including the time, place, manner and perpetrators of the fraudulent transaction. See Fed. R. Crim. P. 7(c). Since the indictments enabled petitioners to prepare a defense to the specified charges while adequately protecting petitioners from future prosecutions for the same offense, the court of appeals correctly rejected petitioners' claims on this point (Pet. App. 21-22). *Hamling* v. *United States*, 418 U.S. 87, 117 (1974).

Although, as petitioner Chambers points out (Pet. 23-24), the Seventh Circuit once dismissed a four-count indictment which included a Section 1006 count similar to those challenged here (*United States* v. *Quinn*, 365 F. 2d 256 (7th Cir. 1966)), the rationale of that case, which was decided before *Hamling* v. *United States*, *supra*, is not readily discernible.[11] More importantly, the Seventh Circuit subsequently construed *Quinn* to require only that a Section 1006 indictment not "charg[e] and convic[t] an individual for no more than maladministration, mistake or ineptitude." *United States* v. *Kahn*, 381 F. 2d 824, 832 (7th Cir.), cert. denied, 389 U.S. 1015 (1967). Since Counts II and III correctly averred the underlying facts and the elements of the charge, including that petitioners had acted with an "intent to defraud" (Pet App. 7-8), the *Quinn* rationale is inapplicable here. *United States* v.

[11]The court in *Quinn* noted, *inter alia*, that one of the Section 1006 counts failed to aver that the defendant had received money in connection with the bank transaction and also that the entire indictment was invalid because of misjoinder problems. 365 F. 2d at 262-264.

Chenaur, 552 F. 2d 294, 300-301 (9th Cir. 1977) (expressly rejecting *Quinn*).

3. Petitioners also argue (Chambers Pet. 24-32; Griffin Pet. 12-13) that the trial judge abused his discretion in allowing the prosecution to introduce into evidence other similar criminal acts by the petitioners. After three pretrial hearings concerning the admissibility of such evidence, the district court limited the prosecution to those prior acts that involved a fraudulent loan transaction closely analogous to that charged in the indictment (Pet App. 25). Thus, the testimony challenged by petitioners clearly and convincingly demonstrated that on at least two other occasions petitioners had defrauded LPCA by deceptively financing the profitable purchase or sale of land in which they had an interest (Pet App. 25; VI Tr. 177-214, 221-227). Such similar acts were properly admitted by the district court to prove petitioners' knowledge and intent—the issues most strenuously contested by petitioners at trial. Fed. R. Evid. 404(b); *e.g.*, *United States* v. *Crockett*, 534 F. 2d 589, 604-605 (5th Cir. 1976); *United States* v. *Maine*, 413 F. 2d 214 (7th Cir. 1969), cert. denied, 396 U.S. 1001 (1970); 2 *Weinstein's Evidence*, para. 404 [09], at 404-50 to 404-53 (1977). Moreover, given the strong probative worth of this evidence, the district court did not abuse its broad discretion under Fed. R. Evid. 403 in admitting the similar acts testimony. See, *e.g.*, *United States* v. *Maestas*, 554 F. 2d 834, 836 (8th Cir.), cert. denied, 431 U.S. 972 (1977); *United States* v. *Fairchild*, 526 F. 2d 185, 189 (7th Cir. 1975) (Stevens, J.), cert. denied, 425 U.S. 942 (1976)[12].

[12]Petitioner Chambers erroneously suggests (Pet. 24-28) that a conflict exists among the courts of appeals because some of the circuits have concluded that their prior precedent is consistent with Rule 404(b) while others may have been more stringent about other crimes evidence before Rule 404(b) codified the inclusionary approach to the issue. See *United States* v. *Benedetto*, 571 F. 2d 1246,

4. Petitioners also challenge (Chambers Pet. 19, 31; Griffin Pet. 11) the admission of testimony concerning their repurchase of the Huntsman farm. However, evidence of the "buy back", which was prompted by petitioners' desire to keep Huntsman from going to the authorities, was certainly relevant to show petitioners' knowledge and intent. See Fed. R. Evid. 401. Indeed, in connection with the repurchase, defendant Hansell confessed his wrongdoings to Huntsman (Pet App. 19; III Tr. 48-51; IV Tr. 139-146), while Boggess' testimony convincingly evidenced petitioners' knowing participation in the fraudulent transaction (Pet. App. 19-20; VI Tr. 30-67). Finally, in an excess of caution, the trial judge repeatedly admonished the jurors that they could only consider this evidence with regard to the substantive counts (III Tr. 20-32; 52-53; V Tr. 27; VI Tr. 44, 66). Accordingly, the court of appeals correctly concluded (Pet. App. 23-24) that the district court had not abused its broad discretion in admitting the repurchase evidence. Fed. R. Evid. 401, 403; see, *e.g.*, *United States* v. *Baumgarten*, 517 F. 2d 1020, 1027-1030 (8th Cir.), cert. denied, 423 U.S. 878 (1975).

5. Next, petitioners contend (Chambers Pet. 32-34; Griffin Pet. 9-11) that there was insufficient evidence to support a conviction on Count V of the indictment regarding the filing of a false loan application for the purpose of influencing LPCA in violation of 18 U.S.C. 1014 and 2. At the outset, we note that petitioner Chambers was acquitted of this charge and has no cause for complaint. Moreover, the evidence adduced at trial amply justified the district court's decision to submit

1248 (2d Cir. 1978). Moreover, none of the cases cited by petitioner, including *United States* v. *Beechum*, 555 F. 2d 487 (5th Cir. 1977), reh. en banc granted, No. 76-1444 (Nov. 3, 1977), is in conflict with the result here, which involved convincing proof of similar fraudulent schemes.

Count V to the jury regarding all defendants. The Huntsman loan application, which was prepared by Hansell, stated that the borrower sought a "crop loan." (Pet. App. 17-18; II Tr. 193-201; Gov't. Exh. 7). In actuality, of course, the proceeds of the crop loan [13] were used to pay for the 2,880-acre cattle farm which Huntsman had been forced to purchase by petitioners as a condition precedent to any further LPCA financial assistance. Indeed, Hansell would not disburse the proceeds of the loan until Huntsman had arranged for the transfer of a $292,000 cashier's check to him for the purchase of the property (II Tr. 202-207). The evidence further showed that petitioners had denominated the transaction as a crop loan to avoid various purchase loan (mortgage) approval requirements of the bank, such as appraisals and supervisory bank approval of an out-of-territory purchase loan (I Tr. 115, 119-120; II Tr. 22-23). Finally, Griffin, who knew that the loan was to be used to cover the purchase of the property (II Tr. 193), sat on the loan committee that approved Huntsman's crop loan application (Pet. App. 17, 23). In sum, when viewed most favorably to the government, the evidence strongly supported the jury's finding that Griffin had violated Section 1014.

6. Petitioner Chambers raises several objections (Pet. 34-39) to the district court's jury instructions concerning the phrase "intent to defraud" found in Section 1006 (XI Tr. 23-24). Specifically, petitioner claims that the charge would have permitted the jury to convict him for an

[13] Petitioners argue that the bank does not force the recipient of a crop loan to use those proceeds for crop production and that therefore the loan application was not false. However, here petitioners forced Huntsman to use his crop loan to purchase the farm and there was substantial evidence that a crop loan is governed by different regulations from a "real estate" loan and cannot be used to purchase real estate—facts which petitioners obviously knew from their experience as bank officers (Pet. App. 17 n.2; I Tr. 114-116, 119; II Tr. 47-48, 93-94; IV Tr. 9-11, 95).

unknowing violation of bank regulations. But the trial judge correctly informed the jurors that in evaluating the issue of intent they could consider petitioners' "failure to comply with the applicable regulations and bylaws of [LPCA] which *were known to said defendant* * * *" (XI Tr. 24; emphasis supplied). Equally unavailing is petitioners' implication (Pet. 37) that in order to convict, the jurors had to find that the petitioners' fraud ultimately caused a financial loss. *United States* v. *Hykel*, 461 F. 2d 721, 725 (3d Cir. 1972); see *United States* v. *Leopowitch*, 318 U.S. 702, 704 (1943). Finally, the district court's use of the word "benefit" in this portion of the charge is certainly unobjectionable, since Section 1006 uses "benefits" in broadly defining the coverage of that provision. As the court of appeals concluded, the trial judge carefully and correctly instructed the jurors regarding fraud as defined in Section 1006. See *United States* v. *Hykel*, *supra*, 461 F. 2d at 724; *Beaudine* v. *United States*, 368 F. 2d 417, 420 (5th Cir. 1966).

7. Lastly, petitioners' contention (Chambers Pet. 39-40; Griffin Pet. 13-14) concerning the nondisclosure of certain LPCA minutes is without merit. The allegedly exculpatory material consisted of a supervisory bank officer's opinion based on personal surmise (see VI Tr. 118-119) that no criminal violations had occurred (VI Tr. 116-117). Such an opinion was inadmissible at trial. See Fed. R. Evid. 701. Moreover, the record unequivocally reflects that the government had neither possession nor knowledge of this particular portion of the minutes, which were equally accessible to defense counsel (VI Tr. 25-28, 113-141). Furthermore, defense counsel (as well as the prosecution) had the benefit of this material nine days before the trial concluded. In such circumstances, petitioners' claim based on *Brady* v. *Maryland*, 373 U.S. 83 (1963), is frivolous.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1978

DOJ-1978-11